No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

vs.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

Opinion of Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1323-26, 1344—August Term, 1981

(Argued June 14, 1982 Decided February 3, 1983)

Docket Nos. 81-7598, 7766, 7776, 7778, 7856

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Plaintiffs-Appellees-Cross Appellants,

—v.—

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Defendants-Appellants-Cross Appellees.

LITTON SYSTEMS, INC.,

—v.—

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant-Appellee.

Before:

OAKES, MESKILL and KEARSE,

Circuit Judges.

Appeal from jury verdict in an antitrust action in the United States District Court for the Southern District of New York, William C. Conner, *Judge*, finding defendant liable for willful maintenance of monopoly power and attempted monopolization and awarding plaintiff damages in its capacity as competitor and customer of defendant. Affirmed.

HOWARD J. TRIENENS, New York, NY (Jim G. Kilpatric, William J. Jones, David J. Ritchie, New York, NY; Leonard Joseph, Harvey Kurzweil, Joseph Angland, Fred R. Biesecker, Dewey, Ballantine, Bushby, Palmer & Wood, New York, N.Y.; Frank C. Cheston, Henry T. Brendzel, of counsel), *for Defendants-Appellants-Cross-Appellees.*

WILLIAM SIMON, Howrey & Simon, Washington, DC (Theodore F. Craver, Larry L. Yetter, Litton Industries, Inc., Beverly Hills, CA; Peter E. Fleming, Jr., Curtis, Mallet-Prevost, Colt & Mosle, New York, N.Y.; John Bodner, Jr., Francis A. O'Brien, John W. Nields, Jr., Ralph Gordon, Albert O. Cornelison, Jr., Kevin P. McEnery, Lewis M. Barr, Lisa A. Gok, Howrey & Simon, Washington, DC) *for Plaintiffs-Appellees-Cross Appellants.*

OAKES, *Circuit Judge:*

This appeal is taken from jury awards exceeding ninety million dollars before trebling entered by the United States District Court for the Southern District of New York, William C. Conner, Judge, in an antitrust action brought by Litton Systems, Inc. and some of its subsidiaries (Litton) against the American Telephone and Telegraph Company and some of its subsidiaries (AT&T). The awards were based on special jury findings that AT&T used its telephone monopoly illegally to monopolize the telephone terminal equipment market, thereby excluding Litton as a competitor, and imposing costs on Litton as a customer, of the AT&T system. The jury found that this was accomplished principally through opposing the adoption of certification standards and the imposition of tariffs filed with but not approved by the Federal Communications Commission (FCC). The tariffs required telephone customers to connect equipment purchased

from AT&T's competitors to the telephone system only through the use of a device designed by AT&T.

This device—called an "interface device" by Litton and a "protective connecting arrangement" (PCA) by AT&T—was used in lieu of a system of "certification standards." These standards would have regulated, as they indeed now do regulate, the kind of equipment that can be connected with the AT&T system to ensure interconnection compatibility. Under the AT&T tariff, however, Litton had to pay for the privilege, so to speak, of connecting to the system with a "black-box" of AT&T's devising. The tariff was eventually rejected by the FCC in favor of certification standards, and Litton's principal argument before the jury and to the district court was that AT&T's bad faith opposition to certification standards drove Litton out of the telephone terminal equipment market in the interim period between the filing and the ultimate rejection of the tariff. While our recounting of the facts will disclose many other complexities, pro and con, of Litton's case, certainly a crucial factor is the FCC's ultimate finding that the interface device was not needed to protect the AT&T network from harm. Various network users had long purchased equipment from AT&T's competitors, using it without an interface with "no demonstration of . . . harm" to the AT&T network. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C.2d 593, 598 (1975). The gist of Litton's case and the jury's findings is that the interface device was unnecessary and uneconomical and that AT&T at all times knew this was so, and that despite clear prior indications from the FCC that the tariff would be set aside as unreasonable and destructive of competition, AT&T nevertheless proposed and fought

to maintain the tariff—all in bad faith in order to exclude competition in the terminal equipment market.

AT&T raises a score of issues on appeal. In addition to disputing the evidence underlying the jury's verdict, AT&T argues that its opposition to certification standards was privileged under the First Amendment by virtue of the *Noerr-Pennington* doctrine because it merely advocated a position before a government agency. AT&T also claims that the district court erred in its evidentiary rulings, instructions to the jury, and handling of special interrogatories, and that the jury's damage award was not supported by substantial evidence and was inconsistent with certain jury findings in AT&T's favor. The jury verdict for Litton as an AT&T customer is attacked as both unsupported by the evidence and improper under the "filed tariff" doctrine of *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922) and the 'target area' standing doctrine, *see Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972). Finally, AT&T argues that Litton's misconduct during discovery, which resulted in the denial of attorneys' fees to Litton, warranted outright dismissal of the case. Litton appeals the denial of attorneys' fees and conditionally cross-appeals on the basis that the district court's instructions to the jury prevented it from recovering its full measure of damages.

Bearing in mind that in reviewing the jury's verdict the evidence must be viewed in the light most favorable to Litton, we affirm, holding the *Noerr-Pennington* doctrine inapplicable to Litton's suit as a competitor. We have considered all the parties' contentions and have found none requiring reversal. We find that the evidence was sufficient, both in terms of its weight and from the

standpoint of causation, to support the damage award and that the district court's instructions to the jury and evidentiary rulings were free from prejudicial error. We also uphold the verdict for Litton *qua* customer—no small sum, albeit almost wholly insignificant relative to the principal verdict. Although we are not without doubt, perhaps because the amounts involved are so large, we uphold the district court's imposition of discovery sanctions under Federal Rule of Civil Procedure 37 and therefore deny Litton's unconditional cross-appeal. Our disposition of the case renders consideration of Litton's conditional cross-appeal unnecessary. In affirming, we take due note that this case was a model of judicial technique for handling a serious, complex, and difficult jury trial. Irrespective of what we might say regarding certain of the rulings below that we think were questionable or debatable, if not reversible error, we commend the district court's handling of the case.

I. *BACKGROUND*

A. *Early Restrictions on Interconnection*

Prior to 1956, AT&T had an absolute monopoly over long distance telephone service and local telephone service in areas accounting for over eighty percent of this country's telephones. Independent telephone companies, familiar to many rural users, interconnected with AT&T's long distance network and provided local telephone service in those areas not serviced by AT&T. The AT&T "telephone network" comprised local central office switching systems as well as the wires and cables linking them with the businesses and homes of customers. This monopoly, administered under the aegis of the FCC, was recognized as perfectly lawful and proper.

But AT&T had another monopoly—not similarly sanctioned—over the sale and lease of individual telephone sets and business telephone systems. Broadly speaking, a business telephone system can be classified into one of two general categories. The first, a Key System, allows a single telephone set to connect several others through the use of buttons on the telephone. Key Systems are used primarily by small offices. The second category, a PBX System, employs a central console or switching mechanism to allow interconnection of up to several thousand telephones. Key Systems and PBXs—stipulated as the relevant product market in this case—are referred to in the industry as "telephone terminal equipment." AT&T's monopoly over such equipment (including residential telephones) was preserved after the expiration of Alexander Graham Bell's original patents by the simple expedient of prohibiting the attachment of non-AT&T equipment to the AT&T system. AT&T enforced this policy by cutting off service to customers who attached non-AT&T equipment.[1] This practice was approved first by state regulatory agencies and later by the FCC after it assumed regulatory responsibility for telecommunications under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* Because telephone terminal equipment sends electrical signals into the network, this policy was at that time considered necessary to ensure the safe and effective operation of the nationwide telephone network.[2]

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1 Western Electric, an AT&T subsidiary, manufactures telephone terminal equipment sold by AT&T.

2 The AT&T brief describes the *potential* harms to the telephone network from "unbridled terminal equipment" as follows:

> Improper voltages generated or transmitted by customer-provided terminal equipment can cause potentially hazardous electric shock to telephone company customers and employees. Longitudinal

After World War II, however, various users sought to connect devices that AT&T had always considered "foreign attachments" to the telephone network. Efforts to challenge AT&T's absolute prohibition against interconnection of non-AT&T equipment met with some limited success as early as 1947 when, in *Use of Recording Devices*, 11 F.C.C. 1033 (1947), the FCC approved the use of machines to record telephone conversations because such use was not "detrimental to the quality of telephone service." *Id.* at 1048. At the same time, the Commission ruled that interconnection must be made through "[a]dequate connecting arrangements," *id.* at 1048-49, but the responsibility for installing and maintaining connecting arrangements was vested in AT&T. The FCC's concern for the network's integrity was manifested in perhaps its most extreme form in *Hush-A-Phone Corp.*, 20 F.C.C. 391 (1955), where it prohibited the use of a mouthpiece shield designed to enhance user privacy

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> imbalance usually results from improper grounding of the telephone lines and can cause a user to hear increased noise or another voice (*i.e.*, crosstalk) on the telephone line. Excessive signal power also causes noise and crosstalk. Faulty network control signaling can cause numerous problems, including wrong numbers, false busy signals, and incorrect billing. . . . Although a minor problem might be acceptable to a particular customer, the combined effect of many such problems could impair telephone service for other customers.

Brief at 11 n.9.

It is to be noted, however, that no proof of *actual* harm to the telephone network from interconnection with competitors' terminal equipment was ever adduced before the FCC, *see Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C. 2d 593, 596, 598 (1975) (First Report & Order), or in this case. The FCC certification standards as set forth in the order cited above, and as subsequently amended, are nevertheless designed to prevent the occurrence of the four basic potential harms—hazardous voltages, excessive signal power levels, excessive longitudinal imbalance, and improper network control signalling. *Id.* at 601-11.

because, although the shield did not harm the network,[3] it could cause garbling of conversation. The Commission's ruling was set aside and remanded by the unanimous decision in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956),[4] which found the ruling "neither just nor reasonable." In characterizing the ruling as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental," *id.*, the *Hush-A-Phone* court suggested that actual harm to the telephone network was to be the principle governing the validity of interconnection prohibitions.

On remand, the FCC adhered to this principle by ordering AT&T to modify its tariffs to eliminate restrictions against the use of the Hush-A-Phone device and "any other device which does not injure [AT&T's] employees, facilities, the public in its use of [AT&T's] services, or impair the operation of the telephone system." *Hush-A-Phone Corp. v. American Telephone & Telegraph Co.*, 22 F.C.C. 112, 114 (1957). The ruling thus implicitly acknowledged that the AT&T network could be harmed by some forms of interconnection. *See* notes 2 & 3, *supra*. At the same time, the Commission's reference to "any other device" made it clear that the scope of the

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3 This depends on how "harm" is defined; AT&T has always advanced the idea that anything causing a user to hear increased noise or another voice (crosstalk) is harmful and that longitudinal imbalance and excessive signal power do just that. *See* note 2 *supra*.

4 The court stated:

> To say that a telephone subscriber may produce the result in question by cupping his hand and speaking into it, but may not do so by using a device which leaves his hand free to write or do whatever else he wishes, is neither just nor reasonable.

238 F.2d at 269.

ruling extended beyond use of the Hush-A-Phone device. Nevertheless, AT&T cast its revised tariff so as to prohibit interconnection of customer-provided telephone systems.[5]

At about the same time the *Hush-A-Phone* controversy was wending its way through the Commission and the courts, a Texas inventor by the name of Thomas F. Carter was inventing a mobile radio device that allowed its users to conduct two-way conversations with persons using ordinary, stationary telephones. The "Carterfone" used inductive and acoustic principles to connect the mobile user with a telephone "base station" that completed the

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5 Tariff FCC No. 132 provided in part:

B. GENERAL REGULATIONS

7. *Unauthorized Attachments or Connections.*—No equipment, apparatus, circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction or otherwise [except as provided in this tariff.] In case any such unauthorized attachment or connection is made, the telephone company shall have the right to remove or disconnect the same; or to suspend the service during the continuance of said attachment or connection; or to terminate the service.

24. *Miscellaneous Devices Provided by the Customer.*—The provisions of paragraph 7 preceding shall not be construed or applied to bar a customer from using devices which serve his convenience in his use of the facilities of the telephone company in the service for which they are furnished under this tariff, provided any such device so used would not endanger the safety of telephone company employees or the public; damage, require change in or alteration of, or involve direct electrical connection to, the equipment or other facilities of the telephone company; or interfere with the proper functioning of such equipment or facilities, or impair the operation of the telephone system or otherwise injure the public in its use of the telephone company's services. [Except as otherwise provided in this tariff,] nothing herein shall be construed to permit the use of [a recording device] or of a device to interconnect any line or channel of the telephone company with any other communications line or channel of the company or of any other person.

Quoted in Use of the Carterphone Device, 13 F.C.C.2d at 437 (brackets in original; footnotes omitted).

link to the telephone network.[6] Carter began marketing his device in 1959, and within a few years he had sold several thousand units in the United States and throughout the world. The AT&T tariff filed in response to the *Hush-A-Phone* decision was consistently interpreted as prohibiting the use of the Carterfone. *See Use of the Carterphone Device in Message Toll Telephone Service*, 13 F.C.C.2d 430, 438 (1967). Carter challenged the tariff in 1967, and the FCC hearing examiner found that with the exception of a single trivial incident, *id.* at 436, the Carterfone performed "satisfactorily without causing technical problems detectable by the user." *Id.* at 433. Because the Carterfone had no adverse effect on the telephone network, the examiner ruled that its use fell within the rationale of *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956), and that it was "unjust and unreasonable to continue to prohibit use of the Carterphone for the purpose of interconnection after its beneficial and harmless nature has been demonstrated." 13 F.C.C.2d at 439.

The Commission decision following the hearing held that the tariff was "unreasonable and unduly discriminatory." *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 423 (1968). In contrast to the hearing examiner's conclusion that "a general prohibition against the use of interconnection devices is [not] unjust or unwise," *Carterphone*, 13 F.C.C.2d at 440, the Commission found the fact

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6 The Carterfone transmitted to a two-way radio at the base station serving the mobile radio system. To connect a telephone user to the mobile radio user, the base station's telephone handset was placed on a cradle in the Carterfone which automatically switched the radio to the transmitting mode when the mobile user spoke, and returned it to the receiving mode when he stopped—all this without any direct electrical connection to the telephone network.

> [t]hat the telephone companies may not have known prior to the proceedings herein that the Carterfone was in fact harmless is irrelevant, since they barred its use without regard to its effect upon the telephone system. Furthermore, the tariff was the carrier's own. It was not prescribed by the Commission.

13 F.C.C.2d at 425. The Commission further underscored its rejection of a blanket prohibition against interconnection when it noted that "[n]o one entity need provide all interconnection equipment for our telephone system any more than a single source is needed to supply the parts for a space probe." *Id.* at 424. It then invited the submission of "new tariffs which will protect the telephone system against harmful devices" and specifically stated that "the carriers . . . may specify technical standards if they wish." *Id.* at 426.

AT&T immediately sought reconsideration of the Commission's decision. In its order denying reconsideration, the Commission in a very real sense cemented its previous decision as follows:

> We held that the Carterfone filled a need, that its use did not adversely affect the telephone system, that its use was nevertheless precluded by the tariff, and that the tariff was unlawful, and had been in the past, because it prohibited the use of the Carterfone and other interconnecting devices without regard to actual harm caused to the telephone system. We did not prescribe the terms of a new tariff, but left that to the initiative of the telephone companies, pointing out that they were in no wise precluded from adopting reasonable standards to prevent harmful interconnection. Basic to our holding was a rejection of A.T.& T.'s position that because A.T.& T. cannot

control the interconnected private system, interconnection is by definition a degradation of the message toll telephone system without regard to the quality of the interconnecting device or of the interconnected mobile radio system, i.e., without regard to actual harmful effects. We viewed this position[2] and the rule embodying it as unreasonable. . . .

The primary contention upon reconsideration is that our decision permits the use of a myriad of customer-provided devices for interconnection without adequate exploration of the technical and economic problems. This record convinces us that there can be inter-connection without harmful technical effects. . . .

Use of the Carterfone Device in Message Toll Telephone Service v. American Telephone & Telegraph Co., 14 F.C.C.2d 571, 572 (1968).

We found no substantial factors outweighing the necessity of eliminating the arbitrary tariff. Standards to prevent the introduction of harmful inputs can be devised, and enforcing them would be no more difficult than enforcing the present absolute prohibition. Furthermore, notification to the carrier of the installation of a connecting device, which would be a reasonable requirement, would greatly relieve any problems of discovering the source of any harmful interconnection. The record also showed that terminal devices may be used under a standard making actual harm a factor, and the distinction between terminal devices and interconnection appears to be solely one of function unrelated to inherent propensity for injurious effects.

Id. at n.2 (citations omitted).

Significantly, the Commission also noted the broad sweep of its decision:

> We also reject the related claim that the decision goes beyond the issues. To say, as some of the parties do, that the hearing related solely to the Carterfone and not to the validity of the tariff's broad prohibition would make the hearing essentially meaningless. The issues plainly included consideration of the basic validity of the tariff if it was the total prohibitory effect of the tariff which rendered its application to the Carterfone unreasonable. As we pointed out in our June decision, such a fault in a tariff can only be remedied by its revision. It should be noted in this connnection that it was well understood that this was an "interconnection" case, and A.T.& T. and General both argued on a broad base the need for a general prohibition against all interconnection not arranged by them.

Id. at 573. (footnotes and citations omitted)

We quote from the Memorandum Opinion and Order denying the petition for reconsideration at length for two reasons. First, a redacted version was submitted to the jury, a matter disputed by AT&T and considered by us, *infra*. Second, we believe that the clarity of the Commission's language was such that from AT&T's perspective it had to be clear as a bell, so to speak, that at least as of the 1968 *Carterfone* decision, if not before, it was unreasonable, unjust, and discriminatory to prohibit interconnection of terminal equipment without respect to any harm such devices might cause. The ruling by its very terms "require[d] tariffs reasonably addressed to the asserted problems." 14 F.C.C.2d at 573. It was therefore incum-

bent upon AT&T to devise tariffs that would permit attachment of non-harmful devices.

B. *The Interface Tariffs*

We suspect that the parties would disagree little with what we have said about the state of affairs up until the time of the *Carterfone* decision; at least they would agree on the facts, if not our interpretation of them. But what happened after *Carterfone* is hotly debated. Two quite different cases were presented to the jury and argued to us. The telephone company's scenario runs somewhat as follows.

1. *The AT&T Version*

The *Carterfone* decision was to become effective on November 1, 1968, whereupon—intolerably to AT&T—there would be no tariff provisions at all to limit equipment interconnection or specify interconnection standards. AT&T thus faced the prospect of proposing interconnection standards on very short notice with no FCC guidance and novel problems of "real" risks. *See* note 2 *supra*. In 1967, AT&T had formed a Tariff Review Group—perhaps in anticipation of the *Carterfone* ruling—to review possible tariff modifications. Although the Review Group thought performance or certification standards were feasible, this approach was viewed as posing weighty problems of a non-technical nature. Specifically, we are told, the Review Group feared that promulgation and enforcement of such standards by AT&T itself would raise serious antitrust questions. At the same time, the Review Group thought that improperly installed or maintained "good" equipment threatened the system's integ-

rity as much as "bad" equipment, and therefore concluded that a substantial degree of protection could be effected by requiring interface hardware—the "protective connecting arrangement" or PCA.[7] AT&T ultimately followed the Review Group's recommendation and adopted the PCA rather than the certification standards approach. Thus, in late October of 1968, AT&T filed a tariff requiring the use of a PCA to interconnect terminal equipment. AT&T was to provide, install, and maintain the PCA at the customer's expense as fixed by the filed tariff.

The filing of the tariff sparked a spirited response, with twenty-nine parties filing responsive pleadings and comments. Opponents of the tariff argued that the PCA approach was a flawed response to *Carterfone* because it failed to specify interconnection standards, barred the use of customer-provided telephones for network control signalling, and discriminated generally in AT&T's favor. In late December of 1968, the Commission permitted the proposed tariffs to take effect, stating in *American Telephone & Telegraph Co. "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968), that the decision in "*Carterfone* does not hold that a customer may substitute his own equipment or facilities (whether it be telephone instruments, loops, poles, or central office equipments) for that furnished by the telephone company." Although the Commission allowed what we will call the "interface tariffs" to take effect, it explicitly stated that its action was not to be construed as "giving

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7 The PCA mechanism generally combined in a single housing a "network control signalling unit," which AT&T had always claimed was necessary to protect against wrong numbers, false busy signals and incorrect billing, and a "connecting arrangement"; hence the term "protective connecting arrangement."

any specific approval to the revised tariffs," *id.* at 610, leaving entirely open the possibility of further action. In the interim, the Commission directed all segments of the telecommunications industry to engage in "informal engineering and technical conferences," to ascertain what "further changes are necessary, desirable, and technically feasible" in AT&T's tariff offerings. *Id.* at 610.

AT&T tells us that terminal equipment interconnection was the subject of much thought and engineering and economic consideration after the Commission decided to allow the interface tariffs to take effect. Throughout this period, however, AT&T concedes that it had no "statistically meaningful" data regarding actual harm to the network due to interconnection. AT&T Brief at 17-18 & n.21. But, AT&T points out, a National Academy of Sciences (NAS) report commissioned by the FCC ultimately found—the report took some ten months to prepare—that network harm could be caused by a variety of factors. The report concluded that, on balance, the PCA requirement was appropriate because, although a properly enforced certification system could also protect the network from harm, the responsibility for creating and administering such a system should be shouldered by a regulatory agency rather than a private concern. In apparent response to the NAS report, the FCC formed a PBX Advisory Committee in May of 1971. The committee, composed of representatives of various interested parties including, of course, AT&T, studied the feasibility of interconnection without the PCA requirement. AT&T continued to maintain that unlimited interconnection could harm the network.[8]

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[8] The only data AT&T produced, however, addressed effects on the network, such as crosstalk, rather than causes. Thus, in response to a request by the FCC Common Carrier Bureau for comments on

In June of 1972, while the PBX Advisory Committee was preparing its final report, the FCC instituted rule-making proceedings addressing the interconnection is-

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certification standards proposals in October of 1973, AT&T in part submitted the following:

> It is often argued that the impact on the quality of service of the interconnection of customer-provided equipment is merely potential and not real or actual. This is simply not true. In fact, our experience is clearly to the contrary. For example, current studies [the "Hunt Studies"] indicate that intercity private line serving links equipped with at least one customer-provided terminal generated trouble reports at a rate at least 50 percent higher than did serving links equipped with telephone company-provided terminals only. The studies now in progress on message telephone lines are showing like results—the trouble report rate for lines equipped with customer-provided terminals is more than 25 percent higher than lines connected solely to telephone company-provided terminals. As we have previously reported to this Commission with respect to interstate voice grade private line data services, where the same minimum protection criteria apply as on the public switched telecommunications network, a sizable percentage (8.5 percent) of the customers utilizing their own data transmitting equipment were applying signal power in excess of the established network protective criteria, thereby degrading the service of other customers. The same survey showed, in the case of a particular type of connection or interface which is comparable to that encountered on public switched network services, that 18 percent of the customer-provided terminals violated the minimum network protection criteria by a substantial degree.

The comments did state, however, that:

> Complete and exhaustive statistics demonstrating all the harms from uncontrolled interconnection or the total impact on the quality of service might not be obtainable, given the nature of the problem studied. Certain effects simply are not measurable. How many wrong numbers or how much crosstalk occurs from the use of customer-provided terminals can only be observed at the time of or during their occurrence. The difficulties in making such measurements are apparent. However, the data cited above are sufficiently consequential to suggest that interconnection has an adverse impact on the quality of service. Certainly, for the reasons set forth in these comments, further loosening of interconnection policies, such as customer options embodied in the certification proposal before the Commission in this proceeding, is not in the public interest and should not be adopted.

(Footnote omitted).

sues. The FCC took the "extraordinary" step of convening a Federal-State Joint Board (Joint Board) pursuant to 47 U.S.C. § 410(c) (1976), to determine "whether, and to what extent, there is public need . . . to go beyond what we ordered in *Carterfone* and permit customers to provide, in whole or in part" network control signalling units and connecting arrangements. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 35 F.C.C.2d 539, 542 (1972). AT&T points to these developments to buttress its claim that the need for and propriety of the PCA requirement was very much an open question, emphasizing the fact that it took the FCC almost four years after *Carterfone* to address the interconnection issue.

The PBX Committee submitted its final report shortly after the Joint Board convened in 1972. The report included a model certification program based on a "barrier PBX system" that would incorporate protective circuitry obviating the need for a PCA.[9] But by this time, after "lengthy internal debate," AT&T Brief at 21, AT&T decided to oppose certification standards as an unnecessary substitute for the PCA requirement. Mr. John deButts, then AT&T Chairman, announced this position in a speech before the National Association of Regulatory Utility Commissioners (NARUC) in late September of 1973. DeButts stated in his speech that the nationwide switching network was "too valuable a resource to risk a perhaps irreversible threat to its performance that would

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[9] AT&T claims that no equipment available at that time met the standards of the "barrier PBX" posited by the Advisory Committee and suggests that the concept was approved over its objection by non-AT&T chairpersons of Advisory Committee subcommittees. *See* AT&T Brief at 19-20 n.24.

ensue from fragmentation of responsiblity for that performance." Shortly thereafter, AT&T formally opposed the certification standard approach by filing comments in the FCC rulemaking proceedings.[10] That this opposition to certification standards was undertaken in bad faith was a principal special finding of the jury on which the verdict against AT&T turned.[11]

AT&T's decision to stand behind the PCA requirement greatly upped the odds against adoption of a certification standards system. AT&T seems to agree with Litton that the deButts speech was a coda marking Litton's demise as a competitor, but denies that it opposed certification standards in bad faith and argues that Litton's failure in the terminal equipment market was inevitable by late 1973, if not earlier. According to AT&T, Litton's efforts

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10 Elaborating some of the concerns expressed by deButts in his earlier speech, the comments stated:

> The public interest . . . will inevitably be impaired by the duplication of facilities and the division of responsibility that will ensue from further interconnection in an industry where compatibility of components and precise coordination of process are crucial. Interconnection has had an adverse impact on the innovative process in the telephone industry and the impact of certification would be even more detrimental.
>
> . . . [A]ny program of certification would, in our view, inevitably lead to the uncontrolled connection of customer-provided equipment to the telecommunications network. The ability to allocate responsibility for network performance would perforce be destroyed.

11 The finding of predatory or anticompetitive conduct was based in part on "opposing certification in bad faith." Other such conduct initially found was "bad faith refusal to sell inside wiring at all or on a reasonable basis."

After returning its initial verdict, at which time the jury could not agree on whether the interface device tariff had been *filed* in bad faith and whether there had been "bad faith delay in making cutovers," the jury further deliberated at the court's request and found for Litton on these issues as well: hence our use of the term "a principal special finding."

to establish itself in this market were short-lived, poorly executed, and plagued with internal difficulties ranging from inadequate staffing to high-level corporate bribery. Litton entered the market in 1971, selling equipment made by other companies, with the hope that it could quickly develop its own products to feed the distribution and service network it created immediately after *Carterfone*. But by 1973, AT&T claims, Litton had failed to develop the caliber of product needed to compete with AT&T's evolving line of terminal equipment. This fact, coupled with the revelation that certain Litton officials had bribed their way into contracts with terminal equipment users, prompted Litton to exit the market in early 1974. AT&T's rendering of Litton's short, unhappy run in the terminal equipment race suggests that Litton lost because it sprinted early and winded quickly, and not because AT&T squeezed Litton into the rail with the PCA requirement.

In any event, Litton decided to withdraw from the terminal equipment market in early 1974. It was not until November of 1975, AT&T points out, that the FCC adopted regulations establishing certification standards. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS)*, 56 F.C.C.2d 593, 599-613 (1975) (First Report & Order).[12] Although the FCC

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[12] AT&T claims that certain FCC proceedings occurring prior to the adoption of certification standard regulations had the effect of placing the FCC's imprimatur upon the PCA requirement. *See Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utilities Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); *AT&T-Mebane Home Telephone Co.*, 53 F.C.C.2d 473 (1975). It is difficult to see how either of these decisions can be read to qualify the FCC's earlier, explicit statement that it was not approving the proposed tariffs, however. *Telerent* was a declaratory judgment order expressing the Commission's disapproval of a state

declined to include PBX and Key Systems in the certification program at that time, it expressed doubt regarding the Joint Board's recommendation that this equipment presented technical problems warranting general exclusion. AT&T perforce concedes that this ruling included statutory findings that the interface tariffs were "unnecessarily restrictive" and amounted to "unjust and unreasonable discrimination." *Id.* at 598. A few months later, the FCC amended its regulations to cover PBX and Key Systems that employed protective circuitry, *Interstate and Foreign Message Toll Telephone Service*, 58 F.C.C.2d 736 (1976) (Second Report & Order). The FCC's order was affirmed on appeal. *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).[13] Thus, as of October 1977, after certiorari was denied by the Supreme Court, interconnection of non-AT&T equipment employing protective circuitry became a possibility. Finally, in April of 1978, the FCC issued a third order eliminating the protective circuitry requirement for properly registered and installed PBX and Key Systems. *Interstate and Foreign Message Toll Telephone Service*, 67 F.C.C.2d 1255 (1978) (Third Report & Order).

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utility commission's proposed rule that would absolutely prohibit the interconnection of customer-provided equipment on any intrastate portion of the telephone network. The Commission held that the proposed rule was contrary to the thrust of *Carterfone* and recently instituted proceedings considering the possibility of liberalizing the post-*Carterfone* tariffs. In *Mebane* a local telephone company sought exemption from so much of the post-*Carterfone* tariffs as allowed interconnection of customer-provided equipment. Although the Commission upon its own motion granted the local carrier an opportunity to demonstrate the need for a waiver from the tariffs on the basis of economic injury, it specifically ruled that, under *Carterfone*, customers must generally be allowed to provide their own equipment.

13 The appeal covered both the First and Second Report and Order in Docket No. 19528. 56 F.C.C.2d 593 (1975); 58 F.C.C.2d 736 (1976). The latter related to key systems and PBXs. *See* 552 F.2d at 1044.

To summarize, the AT&T scenario sketches a hard-fought battle before the FCC with good faith efforts being made to protect the network. AT&T points out that it was not alone in opposing certification standards; several other interested parties—e.g., NARUC, the Joint Board, and several state utility commissions—supported the PCA approach. AT&T relies on this support, and on the fact that it took over four years from the time Litton exited the terminal equipment market for the FCC to establish certification standards, to back up its claim that it was not AT&T's "bad faith" opposition to certification standards that drove Litton from business. As might be expected, Litton's scenario plays out quite differently.

2. *The Litton Case*

In Litton's scenario, AT&T is cast as a Dorian Gray. To paraphrase Commissioner Johnson's dissent from the order staying the effect of *Carterfone* pending AT&T response, to Litton, the PCA requirement was much as if an electric utility prohibited customers from using a toaster unless it was designed, manufactured, and installed by the utility itself. Litton's case against AT&T relies heavily on the fact that AT&T has never been able to make a case *for* the PCA requirement. Litton reminds us that AT&T has not demonstrated—before the FCC or at the trial of this case—a single instance in which the network had been harmed by a competitor's terminal equipment. Litton Brief at 8. Nevertheless, AT&T imposed the PCA requirement on all equipment sold by its competitors. Strikingly, in one case involving two Atlanta hotels using the very same brand of PBX equipment, no interface was required for the equipment that AT&T purchased from a third-party manufacturer and leased to one hotel, while an interface *was* required when the other

hotel purchased its equipment directly from the third-party manufacturer. Litton suggests, as did the Fourth Circuit in *North Carolina Utilities Commission*, that the PCA requirement was a naked attempt to maintain "private lawmaking authority over independent manufacturers." 552 F.2d at 1051 (emphasis omitted). The PCA requirement stood for almost ten years, giving AT&T a chance to interfere with the normal course of every sale of terminal equipment by Litton and all of AT&T's other competitors.

Litton's argument that AT&T opposed the development of certification standards in bad faith is based on evidence that Litton believes clearly demonstrates, first, that AT&T was aware that it could not substantiate its claims of harm to the network; second, that AT&T knew that without the PCA requirement it was vulnerable to competition; and, finally, that AT&T could have developed certification standards itself immediately after *Carterfone* but opted not to in order to buy the time necessary to meet competition in the terminal equipment market.

Litton put into evidence a number of AT&T documents to support the contention that AT&T simply could not demonstrate that the PCA requirement was necessary to protect the network from harm. Specifically, Litton points to an in-house report apparently prepared in 1971 by one of two AT&T representatives to the PBX Advisory Committee[14] which stated:

> *A Credibility Gap Exists*
>
> [L]imited interconnection on the message network and greater interconnection on private line facilities

[14] Litton claims in its brief that this report was prepared by a Mr. Byers. This appears to be the case; although the copy of the report in the appendix is unsigned, Byers' initials are typed in at the top. In any event AT&T does not dispute Litton's attribution of the report.

> has been in existence for a long period of time and the carriers still find it virtually impossible to cite cases of harm . . . result[ing] from . . . inter-connect[ion] . . . . This inability to demonstrate cases of harm . . . is causing the manufacturers . . . users and regulatory bodies to . . . challenge the expansive efforts which [AT&T] insists must be taken to avoid the network pollution.

Litton Brief at 29-30 (emphasis omitted). To like effect is a 1972 report submitted to AT&T management by the Director of AT&T's Management Sciences Division stating that AT&T was in its "weakest position now, because even though everyone concedes that serious breaches of our tariffs by illegal or unauthorized equipment has grown over the years, we have not been able to produce evidence of harm to anyone." *Id.* at 30. The report recommended that the interface requirement be rescinded. Litton points out that AT&T's sole evidence of potential harm to the system was derived from the Hunt Studies referred to in note 8 *supra* and which were cited by AT&T to the FCC as support for the interface requirement. Various AT&T officials conceded that the studies did not "prove anything." Nevertheless, we know that deButts maintained in his 1973 speech and in the formal filings later submitted to the FCC that there were data supporting AT&T's position on network harm from interconnection.

Litton argues that a portion of the PCA device championed by AT&T was really no more than the dial or pushbutton mechanism of a telephone—the network control signalling unit—that only duplicated the function of the same mechanism in AT&T's competitors' equipment. Moreover, AT&T knew at the outset that the PCA re-

quirement was useless; a Task Force of the Tariff Review Group charged by AT&T management with developing "the strongest possible case to resist customer ownership of telephone equipment" had concluded in early 1968 that a PCA requirement would only "shift[ ] . . . [existing] restrictions on customer-owned devices to similar restrictions through the provision of an arbitrary and redundant Telephone Company device that duplicates the customer's equipment."[15] Litton highlights the fact that the internal AT&T Task Force characterized the PCA requirement as "a redundant, artificial and economic barrier to those wishing to purchase their own equipment." Thus, according to Litton, AT&T's own documents reveal its awareness as stated in a presentation by an AT&T executive at a Traffic Service Advisors' meeting in 1972 that "[o]nly the

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15 The task force report said, *inter alia*:

> An attempt to design an interface, or a family of interfaces, sufficient to minimize all adverse effects of customer-provided equipment poses an economic and administrative problem. . . . Such an interface device would be priced at a level of at least what our existing equipment offering is now. This would, of course, result in what effectively might be considered to be an unjustified economic restriction in allowing a customer to provide his own device. And the provision of an interface does not, in itself, necessarily provide the full protection we desire . . . .

The report also stated: "In general, the arguments against the provision of an interface remain the same, *i.e.*, redundancy, artificial economic barrier to the customer, impracticalities of administration, doubtful acceptance of customers, etc." The task force, in making its report to the Tariff Review Group explicitly rejected the interface device requirement and specifically endorsed technical standards:

> The entire concept of customer-owned equipment must be based on tariff type-approval of all terminal equipment, wiring, and apparatus, rather than on interfaces that would attempt to provide the degree of safety, quality of service, and flexibility for future services that we may wish to provide. The provision, by the Bell System, of families of interfaces for specific devices or of one interface, sophisticated enough to work with all services, would erect a redundant, artificial and economic barrier to those wishing to purchase their own equipment.

'black box' . . . stands as the last hardware barrier between us and the final challenge of unbridled, unlimited, no-holds-barred competition."

In Litton's account, AT&T's support for the PCA requirement was based more on a concern for its share of the terminal equipment market than it was on concern for the safety of the telephone network. Thus, AT&T kept the interface device not only to exclude competition but also to palliate its own competitive inadequacies because, despite the vaunted reputation of Bell Laboratories, AT&T had done little in the years prior to *Carterfone* to update its terminal equipment. Accordingly, notwithstanding the opinion expressed by several members of the AT&T Tariff Review Group that the PCA requirement was not responsive to *Carterfone*,[16] AT&T imposed the requirement in order to give it time to develop competitive terminal equipment. At trial, Litton put in evidence another AT&T document, the McKinsey Report, indicating that AT&T had product development and marketing problems that prevented it from meeting competition in the post-*Carterfone* era. Litton also claims that when AT&T finally did update its terminal equipment line, it did so with "Chinese copies" of successful Japanese products.

Finally, Litton maintains that AT&T could have adopted certification standards no more than a year after *Carterfone*. In support of this claim Litton again points to internal AT&T documents and memoranda suggesting that AT&T management believed the development of certification standards was inevitable by 1972, or 1973 at

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16 *See* the minutes of Tariff Review Group meeting of July 11, 1968 noting that members Cohen, North, and Miller "feel and expressed themselves that current tariff efforts, particularly with respect to interconnection, is [sic] not at all responsive to FCC Carterfone decision."

the latest. Litton Brief at 31-32. Litton suggests that AT&T's participation in the PBX Advisory Committee was a ruse or delaying tactic, and that the decision to oppose certification was concealed from the FCC while AT&T appeared to cooperate with the Advisory Committee so as to avoid the appearance of bad faith.

If there is an individual villain in Litton's piece it is Mr. John deButts. DeButts took over as Chairman and CEO of AT&T about four years after *Carterfone* and stressed the fact to his management that AT&T would have only one policy with respect to certification standards: opposition. In the face of recommendations from subordinates that a certification standards approach was preferable to the PCA requirement, deButts nevertheless opposed the standards. Moreover, Litton argues that the AT&T position on certification, as dictated by deButts, was taken with full knowledge that the FCC would ultimately reject this position. Litton claims that AT&T understood that its opposition to certification exposed it to antitrust liability, citing an AT&T film simulating an antitrust trial of a suit similar to the one eventually filed by Litton and urging employees to destroy incriminating company documents. DeButts apparently remarked to AT&T lawyers shortly after his speech that he had created more opportunities for lawyers than anything "since Sherman wrote his famous law."

We thus arrive again at what both parties agree was a pivotal point for Litton in the interface tariff chronology: the deButts speech of 1973. In contrast to AT&T's claim that the PCA requirement amounted to only a little protection for the system that also served to avoid the antitrust difficulties that might flow from an AT&T enforced certification program, Litton argues that

AT&T's opposition to certification—its insistence upon the PCA requirement—posed psychological and economic market barriers that drove Litton from the terminal equipment market. On the psychological side, Litton claims that the very imposition of the PCA requirement, without regard to its cost or inconvenience, caused customers to doubt the quality of Litton's product. Litton analogizes its burden under the interface tariffs to that which would face a foreign car manufacturer if its ability to sell in the American market were conditioned upon including a giant fire extinguisher in the car's trunk. Litton also presented evidence tending to show that AT&T engaged in slash and burn tactics calculated to make cutover from AT&T to Litton equipment as bothersome as possible for Litton and its customers alike. AT&T installers from time to time would chop off existing AT&T wiring flush with office walls in preparation for the installation of Litton equipment. AT&T made the PCA requirement onerous for customers in other ways as well: refusing to acknowledge receipt of letters arranging cutover dates, changing cutover dates, or failing to provide the necessary PCA equipment. Finally, Litton argues that AT&T's PCA devices themselves occasionally malfunctioned, thus adding actual injury to technological insult.

The PCA requirement also effected a direct economic barrier to Litton's market entry insofar as it increased the cost of installing and using Litton equipment. Although this case did not involve single line telephone sets, i.e., residential telephones, Litton is quick to point out that the PCA requirement precluded all of AT&T's competitors from entering this market because the PCA cost alone exceeded the cost of renting a telephone from

AT&T.[17] Litton argues that these costs also effectively foreclosed sales of Key Systems involving five lines or less, estimated to be over 90% of the Key System market. In the market for larger Key Systems and PBX Systems, the PCA requirement was, in effect, a surcharge imposed by AT&T on customers using non-AT&T equipment sold by Litton and other competitors. When it became clear in late 1973 that AT&T would fight for the PCA requirement, Litton believed its only recourse was to cut its losses and leave the terminal equipment market because by that time AT&T had copied the successful products Litton was offering, narrowing whatever competitive advantage Litton would have had even in the absence of the PCA surcharge.

Thus, in Litton's scenario, AT&T's support for the PCA requirement—its opposition to certification standards—was no more than a rear guard effort to delay the effect of *Carterfone*, undertaken in bad faith in order to handicap competitors. The deButts speech slammed shut what was, from Litton's perspective, the "window of opportunity" created by *Carterfone*. Litton had intended to take advantage of this opportunity by following the same three-step market development program it had used successfully in other product markets.[18] First it engaged in

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17 The monthly charge for the AT&T interface device was about $6.00, as compared to a residential phone rental rate of about $1.25 a month. Litton claims that the PCA requirement increased its Key Systems customers' costs by some 18 to 35 percent, depending on the size and type of installation, over what they would have been in the absence of the requirement. In the PBX Systems market, Litton claims the PCA requirement increased its customers' costs by 8 to 20 percent. Litton Brief at 48-49.

18 Litton's market strategy as outlined in its 1971 Business Telephone Systems Interconnect Opportunity Plan comprised three essential steps. The first step involved the creation of an extensive distribution and service network covering major metropolitan areas. In this first stage Litton planned to sell reliable terminal equipment manufactured

the sale of reliable products manufactured by other concerns—this to allow Litton the opportunity to establish an immediate market presence while it readied its own products. Litton compares its 1980 gross sales of close to five billion dollars with its start in 1953 as a small electronics company and emphasizes its highly successful progress and depth of skill in the telecommunications industry. In fact, Litton had extensive engineering and installation expertise in terminal equipment—highly sophisticated terminal equipment for special customers like airports and the Department of Defense. Litton's statistics indicate that, if anything, its performance exceeded its own expectations. Within a year and a half of its decision to enter the terminal equipment market, it was making close to one quarter of all interconnect sales. To counter AT&T's claim that Litton had no marketable products of its own in the early 1970's, Litton argues that AT&T itself was responsible for this: it refused to interconnect the innovative Litton "plexcom" switch, which was "years ahead" of anything AT&T had to offer. By this time, according to Litton, AT&T's anticompetitive efforts had taken their toll in increased prices and decreased sales. When the deButts speech made it clear that AT&T would continue to resist the implementation of *Carterfone*, Litton claims that, like many other manufacturers during that period, it simply could not remain in the market.

Ultimately, the jury agreed in the main with Litton, finding that AT&T opposed certification standards in bad faith and that other AT&T conduct involving the supply

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by established firms while it continued its own research and development efforts. In the second stage, Litton planned to introduce its own equipment to customers. In the third and final stage, the sales and distribution network would be expanded to cover the entire country, at which time Litton would sell and distribute its own products nationwide.

of PCAs and the sale of inside wiring was unreasonable and injurious to Litton as a competitor. The jury also, after rendering the main verdict with respect to liability and damages, found that AT&T *filed* the interface tariffs in the first instance in bad faith. Despite arguments made here that the damage award was based on a study relying on unsupported assumptions that made it impossible for the jury to estimate the damages attributable only to conduct found illegal, liability was found in a specific amount, namely, in the case of Litton *qua* competitor, \$91,990,000, and in the case of Litton *qua* customer, \$268,243. The sum of these figures, \$92,258,243, was trebled as provided by 15 U.S.C. § 15.

II. *DISCUSSION*

A. *Introduction*

As the factual summary above suggests, there is little in this case that the parties agree upon. AT&T contends that a portion of the jury's verdict and two of its factual findings must be set aside because they were made "belatedly" and as a result of coercion. Second, AT&T argues that under the *Noerr-Pennington* doctrine the jury was precluded from finding that certain practices relied on to support both the initial and the "belated" verdict were anticompetitive or predatory. Third, AT&T maintains that there was insufficient evidence to support any of the jury's factual findings and the entire verdict must therefore be set aside. Fourth, again in an evidentiary vein, AT&T claims that various rulings by the trial court judge on the admissibility of evidence so prejudiced its defense that it is entitled to a new trial. AT&T's fifth argument flanks the merits, so to speak, and attacks the jury's damage awards. Finally, AT&T argues that the entire case

should have been dismissed as a sanction for Litton's discovery misconduct. Litton argues that this misconduct was an excusable oversight and that the district court's sanction—denial of any attorneys' fees—was impermissibly severe.

B. *The "Belated" Jury Findings*

After eight days of deliberation, the jury found AT&T guilty of monopolization and an attempt to monopolize the relevant product market. In response to special interrogatories the jury specifically found three AT&T practices—opposition to certification, delay in providing interface devices, and conduct in connection with the sale of inside wiring—anticompetitive and predatory. Because the jury found that AT&T's monopolization was the proximate cause of Litton's injury, it entered an award for Litton as both a competitor and customer of AT&T. The jury initially failed, however, to reach unanimity on three matters: (1) whether the attempted monopolization proximately caused Litton's injury, and whether either (2) the original filing of the interface tariff or (3) delay in effecting cutover from AT&T to Litton equipment was anticompetitive or predatory. The trial judge asked the jury to attempt to reach a unanimous result one way or the other on the remaining issues and the jury indicated its willingness to do so. After deliberating a short while, the jury returned with affirmative answers favorable to Litton on all three questions. AT&T makes an extensive argument that these "belated" findings were coerced and therefore should be set aside. Although the verdict on the monopoly charge can be sustained, and the damage award affirmed, if there is support for each of the initial three findings made pursuant to Federal Rule of Civil Procedure 49, *see Northeastern Telephone Co. v. AT&T*,

651 F.2d 76, 94-95 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1438 (1982), disposition of the threshold claim that these later findings must be set aside will enable us to consolidate our discussion of the more difficult *Noerr-Pennington* issues AT&T raises.

It was, of course, completely appropriate to submit special interrogatories to the jury, particularly in a case as complex and protracted as this one.[19] In asking the jury to specify whether it found each of the alleged predatory practices to have been proved, the trial court was merely following *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 299 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). For whatever reason, the jury did not agree unanimously on two interrogatories and the proximate cause component of the attempted monopolization charge. There was nothing unusual, much less erroneous, in the trial court's resubmission of these questions. *See, e.g., Turchio v. D/S A/S DEN NORSKE AFRICA*, 509 F.2d 101, 105 (2d Cir. 1974) (if the jury fails to answer interrogatory it is appropriate to resubmit the interrogatory "a second and third time to obtain answers to the unanswered questions").[20]

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19 The practice has been described as "usually preferable to the opaque general verdict." *Skidmore v. Baltimore & Ohio RR. Co.*, 167 F.2d 54, 67 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948). *See also* Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 206 (1966) (submission of special verdicts can serve to clarify confusing or complicated litigation).

20 Indeed, if the jury had found against Litton on the proximate cause question relating to the attempted monopolization charge, the trial court judge might reasonably have inferred that this was inconsistent with the jury's general verdict and damage award. The record indicates that this possibility was of some concern to both the trial court judge and the attorneys for both parties. In light of the express provision in Fed. R. Civ. P. 49(b) that a trial court may "return the jury for further consideration of its answers and verdict" in order to eliminate any inconsistencies between a general verdict and special findings, we do

AT&T's contention that the jury was somehow "coerced" into rendering answers favorable to Litton upon resubmission cannot be squared with the facts. The jury did not indicate that it was deadlocked on these questions; it indicated that it was divided. That the jury took its task seriously and deliberated conscientiously is manifest; before rendering its initial verdict the jury requested guidance from the court as to whether it could continue if it was divided on a question. AT&T can hardly argue that the jury was predisposed to find in Litton's favor given the fact that it found *against* Litton on two out of four theories of liability and divided on a third.[21] AT&T's argument that the jury had no incentive to find against Litton on the unresolved proximate cause question because the initial verdict would stand in any event is pure speculation. Even if we were to concede AT&T's premise that the jury was likely to shirk its duty conscientiously to reconsider these questions—a premise we find highly questionable given that the jury served over five months without a single absence and deliberated for eight days[22]—the conclusion that it was likely to resolve these questions in Litton's favor simply does not follow.[23]

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not see how it can be error to "return the jury for further consideration" of an interrogatory it did not answer.

21 Specifically, the jury found against Litton on its claim that AT&T engaged in a conspiracy to monopolize (claim three) and in a conspiracy to restrain trade (claim four).

22 The trial court judge praised the jury at the close of the trial as follows:

> Not a single juror has missed a single day because of illness or any other personal matter. . . . That is absolutely amazing . . . . You have also been the most punctual jury I have ever had. . . . You have been a vindication of the jury system and all that it means.

23 AT&T's argument that the jury had no incentive to find against Litton on one claim because it had found for Litton on another is a

Nor do we find anything coercive in the trial judge's instructions. The jurors were informed that their answers to the questions were "important" and that they should listen to the views of their fellow jurors without abandoning their own conscientiously held views. Far from being coercive, this instruction was completely in keeping with the recognition that:

> A system which requires the unanimous verdict of a jury . . . can function satisfactorily in most cases only because most jurors are reasonable . . . and after a certain amount of discussion has produced a large majority in favor of one view, those in the minority may be willing to join the majority in the belief that if so many other reasonable people have a contrary view, the views of the minority may well be mistaken. Instructions . . . in both state and federal courts stress the importance of jurors listening to the views of one another and making allowance for the fact that there can be a reasonable difference of opinion.

Grace Lines, Inc. v. Motley, 439 F.2d 1028, 1033 (2d Cir. 1971) (Lumbard, C.J., *concurring*). The instructions here fall far short of those sustained in *e.g.*, *United States v. Corcione*, 592 F.2d 111, 117 n.5 (2d Cir.), *cert. denied*, 440 U.S. 975 (1979) (after jury deadlocked on criminal charge, trial judge instructed jury that it should "consult with one another and . . . deliberate with a view to reaching agreement if you can possibly do so"); *United States v. Robinson*, 560 F.2d 507, 511 n.6 (2d Cir. 1977),

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criticism that can be made whenever a plaintiff's case involves multiple claims, any one of which would be sufficient to support a damage award. Thus viewed, AT&T's position is more an indictment of the jury system than an argument against resubmission.

cert. denied, 435 U.S. 905 (1978) (jury instructed that "[i]t is important that a decision . . . be reached here, and I really see no good reasons why a decision cannot be reached").[24] Litton was entitled to a jury determination on all of its claims and we do not believe the trial court judge erred either in resubmitting the claims or in instructing the jury as he did. There is no factual or logical basis for AT&T's arguments that resubmission of these questions tipped the balance in Litton's favor.[25]

C. *AT&T's* Noerr-Pennington *Claims*

According to AT&T, the "fundamental error that pervaded the trial of this case was the failure of the trial court to recognize that the principal . . . conduct upon which the judgment is based . . . was protected" under

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[24] AT&T's contention that the trial court judge "pressured" the jury into resolving the undecided questions in Litton's favor is based on the following instruction:

> [A]ny question that is left unanswered creates a possible problem for the parties and the Court. I don't need to give you specific examples of that. It is a fact that we would like positive answers of either 'yes' or 'no' to the questions, *if you can possibly agree after discussing the matter again . . . to see whether or not you can't in good conscience* adopt [the views of other jurors] as your own. It will clear up a lot of problems for us if you can.

(Emphasis added.)

This instruction correctly emphasized both the importance of reaching a verdict and the necessity of doing so only in accordance with the conscientiously held views of each juror. If the trial court judge had elaborated upon the "possible problem"—i.e., inconsistency between a general verdict in Litton's favor and negative finding on the attempted monopolization proximate cause question—we might be inclined to agree with AT&T that the effect could be to bias the jury. But this is precisely the effect that the trial court judge avoided by phrasing the instruction as he did.

[25] We note that under the trial court judge's instructions the jury could have, but did not, increase the damages it previously awarded Litton. Empirically, this undercuts AT&T's contention that the jury was predisposed to find against it.

the doctrine developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). AT&T Brief at 43. AT&T argues that both its opposition to certification standards and its original filing of the interface tariffs should not have been submitted to the jury because this conduct did not, as a matter of law under the evidence adduced by Litton, fall within the only exception—the so-called "sham" exception—to *Noerr-Pennington.*

Noerr, it will be recalled, involved a deceptive political campaign waged as part of the bitter economic feud between the railroad and trucking industries for control of the interstate, heavy freight hauling market. Trucking industry representatives sued a railroad trade association, alleging that a publicity campaign advocating legislation favorable to the railroads violated the Sherman Act because the campaign's sole purpose was to hamper the trucking industry's ability to compete with the railroads. The Court held that "the Sherman Act . . . does not apply to . . . activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws," 365 U.S. at 138, irrespective of whether the activities might be considered fraudulent or deceptive. The *Noerr* holding was, strictly speaking, a matter of statutory construction,[26] but First Amendment concerns clearly informed the decision. The Court feared that an expansive construction of the Sherman Act would impinge upon the right to petition and impair the government's ability "to take actions through its legislature and executive that operate to restrain trade." 365 U.S. at

[26] *See* 365 U.S. at 132 n.6. *See generally*, Fischel, *Antitrust Liability for Attempts to Influence Governmental Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. Chi. L. Rev. 80, 82-84 (1977).

137.[27] These factors, as well as the "essential dissimilarity" between joint efforts to seek legislation and "agreements traditionally condemned" under the Act, *id.* at 136, led the Court to conclude that Congress could not have intended the Act to reach such behavior. In reaching this result, the Court found the question of intent irrelevant, stating that "insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." 365 U.S. at 139-40. In dictum, however, the Court indicated that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144.

The *Pennington* decision restated, and to some extent arguably amplified, *Noerr.* In *Pennington* an industry union and large firms urged the Secretary of Labor to establish minimum wage levels that would have the effect of squeezing out smaller firms.[28] The Court held that

[27] The Court was concerned that construing the Sherman Act to reach essentially political activity would hamper the "ability of the people to make their wishes known to their representatives," 365 U.S. at 137, thus invoking a traditional First Amendment theme. *See also id.* at 138; A. Meiklejohn, Political Freedom 26-28 (1948); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

[28] The conduct challenged in *Pennington* included efforts to induce the TVA, a government corporation, to curtail its purchases of coal at reduced prices on the spot market. The Supreme Court did not address the issue, but some lower courts have concluded *Noerr-Pennington* does not immunize anticompetitive efforts directed at government agencies acting in a proprietary capacity—i.e., as buyers or sellers. *See, e.g., Sacramento Coca-Cola Bottling Co. v. Chauffeurs Teamsters & Helpers Local No. 150*, 440 F.2d 1096, 1099 (9th Cir.), *cert. denied*, 404

"*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670. *Pennington* made it clear that efforts directed at executive officials or agencies—as distinguished from the legislative and publicity efforts involved in *Noerr*—were protected. *Pennington* also emphatically reaffirmed *Noerr's* holding that anticompetitive intent did not make an otherwise legitimate attempt to secure governmental action or express a political position illegal; the Court stated that "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.*

The last case generally cited in any exegesis of the *Noerr-Pennington* doctrine is *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). This case involved a group of trucking companies that opposed " 'with or without probable cause, and regardless of the merits of the cases,' " each and every license application made by the group's competitors to a state regulatory agency. *Id.* at 512. *California Motor Transport* both expanded and limited the *Noerr-Pennington* doctrine. Although the Court ultimately held against the defendants, it broadened and strengthened the base of the doctrine by holding, first, that it applied to administrative and adjudicative proceedings and, second, that it was constitutionally based.[29] At the same time, the Court

U.S. 826 (1971); *George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970). A Fifth Circuit case, and a district court decision in the Third Circuit, are *contra*. *See Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152 (5th Cir. 1971) (reh. en banc); *United States v. Johns-Manville Corp.*, 259 F. Supp. 440 (E.D. Pa. 1966).

29 404 U.S. at 510-11. The *California Motor Transport* Court squarely held that First Amendment rights of petition and association underlay

imposed limits upon the doctrine by holding that the plaintiff's allegations triggered the application of the *Noerr* sham dictum.

AT&T points primarily to the *Noerr* and *Pennington* decisions and argues that even if its conduct was undertaken for anticompetitive reasons, it was nevertheless protected. To this Litton replies that *Noerr-Pennington* is inapplicable because AT&T injured Litton not by requesting or as a result of governmental action, but by virtue of what AT&T itself did in filing and maintaining the interface tariffs while opposing the only feasible alternative—certification standards—in bad faith. In the alternative, Litton maintains that this case presents a "paradigm of the 'sham' exception to the *Noerr* doctrine." Thus, there are two strings to the Litton bow: inapplicability of the *Noerr-Pennington* doctrine because the injury flowed from actions not within the scope of the doctrine, and applicability of the "sham" exception. Judge Meskill and I agree with Litton on both counts for reasons we set forth below; Judge Kearse concurs only on the second ground and does not join in the immediately following portion of the opinion.

1. *Applicability of the* Noerr-Pennington *Doctrine*

AT&T characterizes its filing of the interface tariffs after *Carterfone* as an "application" to the FCC, and contends that "*Noerr-Pennington* . . . does not permit antitrust liability to be based on such applications to a regulatory agency." AT&T Brief at 82. In essence, AT&T's argument is that its conduct in devising and filing the

the *Noerr-Pennington* doctrine. The *Noerr* Court only went so far as to suggest that an interpretation of the Sherman Act contrary to the one it adopted "would raise important constitutional questions." 365 U.S. at 138.

tariffs is immunized because the tariffs were contested and AT&T defended them before the FCC. If this argument were accepted, a common regulatory practice[30] designed to protect consumers would instead shield from antitrust liability the very entities the practice seeks to restrain and regulate. In an earlier case involving this same defendant we concluded that pervasive regulation of the telecommunications industry does not, without more, confer antitrust immunity. *See, Northeastern Telephone Co.*, 651 F.2d at 83; *see also International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 935-36 (9th Cir. 1975); *cf., United States v. American Telephone & Telegraph Co.*, 524 F.Supp. 1336, 1357-60 (D.D.C. 1981) (declining to decide whether compliance with regulatory mandates insulates a defendant from antitrust liability.) If extensive substantive regulation does not warrant an antitrust exemption, then surely an essentially procedural aspect of regulation—tariff filing—cannot.

Apart from the obvious difficulty of reconciling the effect of AT&T's *Noerr-Pennington* argument with the Supreme Court's repeated admonition that antitrust ex-

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30 *See, e.g.*, 14 C.F.R. § 221.3 (1982) (Civil Aeronautics Board) (requiring all domestic and foreign air carriers to file "tariffs showing all rates, fares, and charges" for air transportation); 18 C.F.R. § 35.1(a) (1982) (Federal Energy Regulatory Commission) (requiring "[e]very public utility [to] file . . . full and complete rate schedules . . . setting forth all rates and charges for any transmission or sale of electric energy"); 46 C.F.R. § 531.3 (1981) (Federal Maritime Commission) (requiring "[e]very domestic offshore carrier [to] file . . . tariffs showing its actual rates, fares and charges"). Filing requirements like those cited above and those imposed by the FCC under § 47 C.F.R. § 61 *et seq.* (1981) hearken back to the original justification for administrative regulation of industries affected with a public interest: preventing discrimination on the basis of price or terms of service. *See generally* Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 Harv. L. Rev. 1105, 1106-07 (1954).

emptions are to be countenanced only where "there is a 'plain repugnancy between the antitrust and regulatory provisions,' " *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975), *quoting United States v. Philadelphia National Bank*, 374 U.S. 321, 350 (1963); *see also Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963), we believe that AT&T's position must be rejected for a more fundamental reason. AT&T erroneously assumes that a mere *incident* of regulation—the tariff filing requirement—is tantamount to a request for governmental action akin to the conduct held protected in *Noerr* and *Pennington*. But in this case, as in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962), the *Noerr-Pennington* doctrine is "plainly inapposite" because AT&T was "engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC; AT&T's power to exclude Litton and other competitors from the telephone terminal equipment market resulted not from the FCC's regulatory authority but from AT&T's exclusive control of the telephone network.[31] AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures. The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent decisions as to how it will conduct its business into a "request" for governmental

[31] *See also United States v. American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981) (analyzing AT&T's monopoly over local telephone service in terms of the "essential facility" or "strategic bottleneck" doctrine).

action or an "expression" of political opinion.[32] Similarly, the FCC's failure to strike down a tariff at the time of its filing does not make the conduct lawful, particularly where, as in this case, the agency specifically declines to rule on a tariff's legality.

We therefore follow the plurality in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976), where four Justices rejected AT&T's *amicus curiae* argument that a tariff filing was protected as a request for governmental action under *Noerr-Pennington*. In *Cantor*, the plurality held that a tariff filed by an electric utility could not

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32 Under applicable federal regulations, AT&T could have at any time revoked the interface tariff on its own initiative by filing another tariff. 47 C.F.R. § 61.57(a) (1981). We concluded almost ten years ago in *American Telephone & Telegraph Co. v. FCC*, 487 F.2d 865, 871-76 (2d Cir. 1973) that sections 203 and 205 of the Communications Act of 1934 contemplated "carrier initiated rate changes" that the FCC could set aside only in the manner prescribed by the statute itself. The obverse of this, of course, is that a tariff is an independent exercise of the carrier's business judgment that receives no government imprimatur until and unless the FCC reviews the tariff in response to a complaint or upon its own initiative. A number of other courts have reached the same conclusion. *See Phonetele, Inc. v. American Telephone & Telegraph Co.*, 664 F.2d 716, 7[illegible] 735 (9th Cir. 1981) (FCC does not adopt or approve tariff filings it permits to become effective; tariff filings are "the product of the regulated entity's independent initiative and judgment"); *Sound, Inc. v. American Telephone & Telegraph Co.*, 631 F.2d 1324, 1330 (8th Cir. 1980) ("Bell, not the FCC, proposes its rates, regulations and restrictions . . . . In filing each tariff, Bell implements its own business judgment . . . ."); *MCI Telecommunications Corp. v. FCC*, 561 F.2d 365, 374 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) ("[T]he tariff provisions of the Communications Act . . . embody a considered legislative judgment that carriers should in general be free to initiate . . . new rates or services . . . unless and until the Commission, after hearing, determines that such rates or practices are unlawful . . . .").

We note that AT&T's argument does not rely on the "filed tariff" doctrine of *Keogh v. Chicago & Northwestern Ry.*, 260 U.S. 156, 162 (1922). *See City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981) ("filed tariff" doctrine inapplicable where regulatory agency expressly refuses to commit itself and tariff is ultimately disapproved).

evade scrutiny under the antitrust laws simply because it was filed in accordance with state law and approved by a state agency. The *Cantor* plurality stated that

> nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

Id. Chief Justice Burger did not concur in that portion of the plurality's opinion discussing *Noerr-Pennington*, but his objection went to the plurality's construction of the "state action" exemption doctrine under *Parker v. Brown*, 317 U.S. 341 (1943), and he said nothing in disagreement with the plurality's interpretation of *Noerr.* Justice Blackmun's concurrence also did not address *Noerr*, but rather would rely on "a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits." 428 U.S. at 610. Although we are aware that plurality opinions can provide only limited guidance on an issue a majority of the Court did not address,[33] we believe that to the extent that both

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[33] The Court has indicated that in interpreting plurality holdings lower courts should look to the "narrowest ground" relied upon in a concurring Justice's opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion). Although this rule seems of limited utility where, as here, the concurring Justices do not address the issue in question, it seems plausible to assume that if either Chief Justice Burger or Justice Blackmun felt there was merit to the *Noerr-Pennington* argument made by the defendant or AT&T as *amicus*, they would not have concurred in the judgment. Nor is it entirely clear that the dissenting opinion written by Justice Stewart and joined by Justices Powell and Rehnquist

Justice Blackmun and Chief Justice Burger were unwilling to equate "state action" with a utility's adherence to a tariff filing required by state law, they would reject *a fortiori* the argument that the tariff filing amounted to a request for governmental action.[34]

Much of our analysis relating to the filing of the interface tariffs applies to AT&T's opposition to certification. Opposition to certification is simply the other side of the interface tariff coin; AT&T's filing and maintenance of the PCA requirement was the very embodiment of opposition to the only feasible alternative—certification standards. To be sure, AT&T argues that its "opposition" to the development of certification standards was by definition protected under *Noerr-Pennington* because it amounted to no more than espousing a position before an administrative body. But our review of

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would hold AT&T's conduct in this case protected under *Noerr-Pennington*. Although the dissenting opinion stated that

> *Parker, Noerr,* and *Goldfarb* point unerringly to the proper disposition of this case . . . . The utility company . . . engages in two distinct activities: It proposes a tariff and, if the tariff is approved, it obeys its terms. The first action cannot give rise to antitrust liability under *Noerr* and the second—compliance with the terms of the tariff under the command of state law—is immune from antitrust liability under *Parker* and *Goldfarb*.

428 U.S. at 624, the tariff in question in *Cantor* was apparently specifically approved by the state regulatory agency. *Id.* at 583. In this case, of course, the FCC took pains to state that permitting the tariff to take effect was not to be construed as approval of the tariff.

34 We note that Chief Justice Burger stated in his concurring opinion that the plurality "correctly concludes: 'The Commission's approval of respondent's decision to maintain such a program does not . . . implement any statewide policy.' " 428 U.S. at 604. The Eighth Circuit has recently read *Cantor* as not providing *Noerr-Pennington* protection for tariff filings. *See City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1181 (8th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3026 (U.S. June 11, 1982) (No. 81-2278). *See also United States v. Title Insurance Rating Bureau of Arizona, Inc.*, 517 F. Supp. 1053, 1059-60 (D. Ariz. 1981).

the evidence presented by Litton suggests that AT&T's *post hoc* characterization of the opposition-to-certification issue is distorted. Litton's evidence indicated that AT&T made unsupportable claims to the FCC regarding network harm, feigned cooperation with the PBX Advisory Committee's efforts to develop certification standards, and generally attempted to buy as much time as possible to improve its own competitive position at the expense of Litton and other competitors.[35] The effect of this was to maintain the interface tariffs and whatever anticompetitive or exclusionary effect that flowed therefrom. AT&T's opposition to certification accordingly embraced much more than merely advocating a position before the FCC.

2. *The "Sham Exception"*

Even if our conclusions regarding the applicability of *Noerr-Pennington* are incorrect, the doctrine is subject to the sham exception suggested by way of dictum in *Noerr* and relied on in *California Motor Transport*. In *California Motor Transport* the defendant instituted proceedings challenging the regulatory approval sought by the plaintiff not with the expectation of prevailing but for purposes of harassment and delay. The Court held that where "the administrative and judicial processes [are] abused," 404 U.S at 513, in an attempt to stifle competition,

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[35] We review this evidence in greater depth in our discussion of the sham exception, *infra*, but we believe that this evidence tends to show that the conduct fairly considered under the rubric of "opposition to certification" amounted to more than simply an expression of AT&T's opinion. *Cf. City of Kirkwood v. Union Electric Co.*, 671 F.2d at 1181 ("The *Noerr-Pennington* doctrine will not protect a utility which manipulates the federal and state regulatory processes to achieve anti-competitive results. It is not for expression of opinion that [the plaintiff] seeks to compel [the defendant] to respond in damages, but rather for [the defendant's] conduct in the market place.").

Noerr-Pennington is inapplicable. The focus of the Court's concern in *California Motor Transport* was the "illegal result" of the abuse, specifically, "effectively barring respondents from access to the agencies and the courts." *Id.*[36] Although the Court conceded that an "abuse" standard involved "a difficult line to discern and draw," a leading antitrust commentator has suggested that this line is crossed when

> the defendant's activity was intended to injure the plaintiff directly rather than through a governmental decision. When the antitrust defendant had not truly sought to influence the governmental decision, his invocation of governmental machinery is a sham. . . . [W]here he had no reasonable expectation of obtaining the favorable ruling, his effort to do so was a sham.

P. Areeda, Antitrust Law ¶ 203.1a (Supp. 1982).

Professor Areeda's view of the heart of the sham exception—invoking the process of administrative or adjudicatory decisionmaking for the injury that the process alone will work upon competitors—possesses the virtue of accommodating the Supreme Court's concern in *Califor-*

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36 We reject the suggestion made in AT&T's brief that the applicability of the sham exception turns on whether a competitor is barred from access to administrative agencies or the courts. The Supreme Court's opinion in *California Motor Transport* cited access barring as one example of the illegal results that might flow from abuse of the administrative process. One of the allegations in *California Motor Transport* that the Court found sufficient to trigger the sham exception is similar to the one Litton made in this case, namely that the defendants "became 'the regulators of the grants of rights, transfers and registrations.'" 404 U.S. at 511. More recent Supreme Court opinions have referred to the sham exception's availability without regard to the necessity of "access barring," *see, e.g.*, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 405 (1978); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 n.6 (1977) (Rehnquist, J., concurring).

nia Motor Transport that these processes not be abused with impunity behind claims of *Noerr-Pennington* immunity. To be sure, there are difficulties involved in determining whether a defendant "truly sought to influence the governmental decision" and whether there was a "reasonable expectation" of doing so. One indicium of whether a defendant could have reasonably expected its position to prevail, and therefore whether the invocation of process was actually an attempt to influence a decision rather than an attempt to interpose delay, is a "pattern of baseless, repetitive claims." 404 U.S. at 513. Thus, we held in *Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 896 (2d Cir. 1981) that an attempt by a defendant to delay the construction of a competitor's shopping mall by carefully orchestrating a series of court and administrative actions designed to defeat a zoning variance was not protected under *Noerr-Pennington*.

But repetition is but one indicium of a sham claim; under *California Motor Transport's* abuse standard "many other forms of illegal and reprehensible practice . . . may corrupt the administrative or judicial processes and . . . result in antitrust violations." 404 U.S. at 513. In *Landmarks Holding*, for example, our conclusion that the judicial and administrative processes had been abused was based in part upon "unethical lawyer conduct" which included, *inter alia*, requests for delays that the defendant's own documents proved were "purely bull." 664 F.2d at 894.[37]

In deciding whether Litton adduced sufficient evidence to demonstrate that AT&T's conduct in connection with the interface tariff and opposition to certification was a

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[37] *Cf.* Note, *Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process*, 86 Harv. L. Rev. 715, 726-35 (1973).

sham, we are of course required to view the evidence in the light most favorable to Litton, giving it the benefit of all inferences that the evidence fairly supports regardless of whether contrary inferences might be drawn. *Continental Ore Co.*, 370 U.S. at 696; *Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc.*, 539 F.2d 907, 911 (2d Cir. 1976). With this in mind, and with reference to the Litton case set out above in I(B)(2) which we think is fairly supported by the evidence, we believe that the sham exception is applicable to AT&T's conduct. As early as the ultimate decision in *Hush-A-Phone*, AT&T knew that the FCC's basic position was that AT&T could not exclude "any device"—a category clearly including telephone terminal equipment—absent a showing of actual harm. The lengthy litigation in *Carterfone* was a matter of industry-wide knowledge and interest; the decision was viewed at the time as a smashing blow to AT&T and as a "window of opportunity" for AT&T's competitors. Anyone reading the language of the *Carterfone* rehearing decision and the Tariff Review Group Task Force Report we have quoted above could conclude that neither filing of the interface tariff nor opposition to certification squared with the FCC's mandate in *Carterfone*.

AT&T nevertheless consistently maintained that the PCA requirement was necessary to protect the telephone network. This was not so much a "pattern of . . . repetitive claims" as it was a unitary, ongoing claim.[38] There was sufficient evidence to allow the jury to conclude that this claim was "baseless"; AT&T's own reports

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[38] The Circuits are split on whether a single claim is sufficient to support application of the sham exception. *See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252, 1266-67 & n.24 (9th Cir. 1982) (concluding that a single claim can be a sham and citing cases on both sides of the proposition).

pointed out that the interface device was redundant, uneconomic, and unnecessary. Time and again AT&T inveighed against the harm that would flow from certification standards without once demonstrating a single instance of harm from what its own reports indicated was a trend in the direction of "illegal" or "unauthorized" interconnection. AT&T asserts that evidence of harm was difficult to produce because of its transitory nature and because the PCA requirement was effective, but the jury could have reasonably concluded—on the basis of evidence indicating that governmental agencies and some 1600 non-AT&T telephone companies were interconnected without a PCA—that AT&T's ongoing claim of harm to the system was baseless.

There was also evidence tending to indicate that AT&T affirmatively misled the FCC with respect to the need for the PCA requirement and the difficulty of developing certification standards. For example, while it opposed certification standards pursuant to the policy announced before NARUC in the deButts speech, AT&T provided the FCC with a study that its own author believed did not prove anything. Similarly, AT&T's own documents indicate that many of its senior executives thought that certification standards could be developed within a matter of months. Indeed, some AT&T documents demonstrated that many AT&T executives believed the standards were inevitable regardless of the position AT&T adopted.

Not surprisingly, AT&T argues that intra-corporate division of opinion on an issue of this nature is inevitable and therefore not indicative of an attempt to subvert the regulatory process. But again, a review of the evidence in the light most favorable to Litton compels us to conclude that the jury could reasonably have inferred that AT&T opposed the development of certification standards in a

manner calculated to delay the day when *Carterfone's* pro-competitive mandate would become fully effective. Litton introduced evidence, and AT&T concedes in its brief, that AT&T "did not complete some of its 'homework assignments' on time" in connection with the PBX Advisory Committee's efforts to develop certification standards. AT&T Brief at 20. And, although AT&T had decided in March of 1973 that it would oppose certification standards, it continued to work with the Advisory Committee in accordance with an internal "Tactics Memorandum" which concluded that withdrawing from the committee would accelerate "decisions in favor of certification." This evidence is sufficient to support an inference that AT&T did what it could to delay and obfuscate the efforts undertaken by the FCC and other interested parties to develop certification standards. As a textbook example of a monopolist in control of an essential facility, *see United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), it is difficult to conclude that these efforts could not have amounted to an abuse of the administrative process. The result, to draw an obvious analogy to *California Motor Transport*, was that Litton and other terminal equipment competitors were barred from access to the telephone network system.

AT&T had no realistic hope that the FCC would approve the interface device; its own people thought that the device was a redundant "artificial barrier" to competition. It nevertheless consciously pursued a policy of delaying the time when the FCC would strike down the PCA requirement. It implemented this policy by making baseless claims relative to potential harms to the network while opposing certification standards in every way possible. AT&T argues that it actually wanted the FCC to

approve the interface device and reject certification standards, but as Professor Areeda points out

> [t]o be sure, [a competitor] would always be pleased to obtain a governmental decision against his rival. But where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so [is] a sham.

P. Areeda, *supra*, at 5. AT&T's conduct was not undertaken in the hope of influencing governmental action, but in the hope of delaying it.[39] *See Landmarks Holding Corp. v. Berman, supra*. As such, it amounted to the sort of abuse of the administrative process that falls within the *Noerr-Pennington* sham exception. The jury's determination to that effect is sustainable if the instructions were correct.

3. *The Trial Court's* Noerr-Pennington *Instructions*

AT&T challenges the *Noerr-Pennington* instructions on two grounds. First, AT&T claims that the instructions entitled "Opposition to Registration" and "First Amendment Protection and the Bad Faith Exception" had the effect when taken together of denying it any *Noerr-Pennington* defense because the jury could have premised its

[39] Professor, now Circuit Judge, Bork has suggested that the antitrust law must develop standards to address the anticompetitive effects of litigation and administrative actions instituted solely to harass and injure a competitor's rivals. *See* R. Bork, The Antitrust Paradox 357 (1978). The need to ensure that the regulatory processes not be used to thwart competition seems all the more pressing where, as here, there is serious doubt regarding whether the process can function at all without the regulated entity's full cooperation. *See United States v. American Telephone & Telegraph Co.*, 524 F. Supp. at 1359 (former Chief of FCC's Common Carrier Bureau testified at trial that FCC may be "incapable of effectively regulating a company of AT&T's size, complexity, and power").

verdict merely on anticompetitive intent. Second, AT&T argues that the First Amendment values that *Noerr-Pennington* reflects require the use of a "clear and convincing" rather than a "preponderance" evidentiary standard.

AT&T's first point can be answered by reviewing the jury instructions, as we must, in their totality. *See, e.g.*, *Norfleet v. Isthmian Lines, Inc.*, 355 F.2d 359, 362-63 (2d Cir. 1966). AT&T maintains that the instructions were flawed because they established a "good faith/bad faith" dichotomy that conditioned the availability of the *Noerr-Pennington* defense on good faith, and equated bad faith with anticompetitive intent. The instructions that AT&T objects to are set forth in the margin.[40] Because we must assume that the jury discharged its obligation to apply the law in accordance with the trial judge's instructions, our

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[40] The court's charge on the issue of "Opposition to Registration"—before the *Noerr-Pennington* defense was mentioned—was as follows:

> You have also heard about Bell's opposition to proposals made before the FCC that the PCA tariffs be replaced by various programs of certifying or registering equipment with the FCC. The question for your decision is whether Bell's opposition was interposed in bad faith for the purpose of excluding competition or whether Bell took this position because it believed that the registration proposals being made were not in the public interest and would not provide sufficient protection to Bell System employees, customers and the telephone network.

AT&T Brief at 63. AT&T correctly argues that a "purpose of excluding competition" does not suffice to create antitrust liability. The charge went on to say:

> Many of these actions, if successful, might be harmful to a competitor. Nevertheless, the First Amendment guarantees that persons or corporations may participate in good faith efforts to influence the passage or enforcement of laws or government regulations or to influence public officials regardless of whether the results of the government action they seek would be harmful to competition.

Id. at 64. AT&T argues that the jury was not given a definition of "good faith," but "bad faith" had just been defined as meaning "for the purpose of excluding competition."

review is limited to whether the instructions misled the jury as to the applicable law. AT&T's brief fails to consider, as we must on review, that portion of the charge where the court explicated what it meant by good faith and bad faith. That portion follows:

> You are also instructed that petitioning an administrative agency such as the FCC or seeking review in the courts may result in delays because administrative or judicial procedures are often time consuming. Creating such delays does not constitute willful exercise of monopoly power as long as the petition or application to the courts is based on a good faith interest in influencing the agency or obtaining a court ruling.
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> However, there is an exception to the general rule that efforts to influence public officials do not violate the antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is a mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by a pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, the First Amendment protections are lost and the Sherman Act applies.

To be sure, the contours of the sham exception are far from clear; the courts have themselves had difficulty defining the doctrine. *See* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. Chi. L. Rev. 80, 104 (1977). The instruction here apprised the

jury that "creating . . . delays" did not constitute an antitrust offense regardless of anticompetitive intent. While the instruction might have been more explicit as to the nature of bad faith, it accurately, if in general terms, tracked the Supreme Court's explication of the sham exception in *California Motor Transport*, and comported in its essentials with our discussion of the sham exception, *supra*. We cannot agree that the instructions were erroneous when viewed as a whole.

The trial court judge did not charge the jury that the sham exception had to be demonstrated by "clear and convincing" evidence. While AT&T cites libel, patent, and fraud cases in support of its argument, it points to no authority holding that the sham exception should be subject to the higher standard of clear and convincing evidence.[41] AT&T argues that the standard should be required in cases such as this to avoid a chilling effect on

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41 The libel cases include *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) and *Yiamouyiannis v. Consumers Union of United States, Inc.*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980).

The fraud and civil perjury cases include: *Clark v. John Lamula Investors, Inc.*, 583 F.2d 594, 597 n.2, 600 (2d Cir. 1978) (securities fraud); *Geller v. Commissioner of Internal Revenue*, 556 F.2d 687, 690 (2d Cir. 1977) (income tax fraud); *McDonnell v. American Leduc Petroleums, Ltd.*, 456 F.2d 1170, 1176 (2d Cir. 1972) (fraud under New York and California law); *Barr Rubber Products Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1120-21 (2d Cir.), *cert. denied*, 400 U.S. 878 (1970) (civil perjury). *See also* 86 Harv. L. Rev., *supra* note 37, at 724-25 (recommending clear and convincing evidence standard for sham exception claims).

The patent case is *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 450 F.2d 769, 772 (9th Cir. 1971), *cert. denied*, 408 U.S. 929 (1972); *see also Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) (allegation in antitrust case that patentee's infringement suit prosecuted with knowledge of patent invalidity).

We take due note that the charge in *MCI Communications Corp. v. American Tel. & Tel. Co.*, Nos. 80-2171, 80-2288 (7th Cir., Jan. 12, 1983), was put in terms of "clear and convincing" proof.

speech. We recognize that the standard of proof may well be a substantive element of a claim or defense, *see, e.g.*, *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943), but by requiring a plaintiff to prove that a defendant's conduct was a sham, the Supreme Court has already struck a rough balance between the competing First Amendment and antitrust interests. And as the Court pointed out in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972), the antitrust laws are as important to the preservation of economic freedom and the free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. We see no reason to impose any higher burden of proof on the antitrust plaintiff asserting sham than would ordinarily be applicable in any civil issue. *See Herman & MacLean v. Huddleston*, 51 U.S.L.W. 4099, 4103 (U.S. Jan. 24, 1983) (preponderance of the evidence standard applicable in securities fraud action under Section 10(b), noting that the interests of defendants in such cases do not differ from the interests of defendants "sued for violations of . . . antitrust . . . laws, for which proof by a preponderance of the evidence suffices").

D. *Sufficiency of Proof*

Our discussion above indicates that we believe there was ample evidence to justify the jury's findings regarding the filing of the interface tariff and opposition to certification. We also conclude, after reviewing the evidence in the light most favorable to Litton, that the jury could reasonably have found that AT&T's conduct in connection with the supply and installation of PCAs, the sale of inside wiring, and "cut-over" from AT&T to Litton equipment was predatory.

AT&T argues that Litton's evidence as to delays in the supply and installation of PCAs consisted of no more than "some vendor and customer complaints." But Litton's evidence, some of which we summarize here, tended to show that PCA shortages were chronic, that they were intentionally maintained or "contrived," and that AT&T misled the FCC with respect to the magnitude of this problem. For example, Litton introduced a 1970 memorandum written by an AT&T vice president stating that AT&T had

> repeatedly been contacted by the FCC staff and outside attorneys with respect to connecting arrangements not being available. So far we have been able to placate the situations with explanations of "a possible misunderstanding or only a temporary delay" and assurances that no serious supply problems exist—followed of course by a four alarm fire approach to meet the particular demand. It is doubtful that this approach will continue to avoid formal action of some sort by the FCC.

The shortages nevertheless continued, as evidenced by complaints received by AT&T from its own local affiliates.

In June of 1972, for example, Illinois Bell, in a telex to AT&T headquarters in New York, explained that because "so many defective units [KS 20721 couplers] have been received we have difficulty in providing this interface unit and meeting customer due dates." And, in October of 1972, an Ohio Bell executive stated in a letter to Ohio Bell's Assistant Vice President that "[A]n increasing number of vendors have complained bitterly because of our failure to supply this equipment. In many recent cases we have been unable to even quote any kind of a realistic

delivery date." This same letter posed a question that no doubt puzzled the jury:

> How can we continue to insist on the use of an interconnect device when we are unable to provide such a device? It seems to me that these problems must be given the highest level of attention at Ohio Bell, Western Electric and A. T. & T. before we end up with a large-scale customer revolt and potential legal action for restraint of trade.

AT&T's response to this letter confirmed the existence of a "critical supply situation . . . throughout the system," which resulted in 76% of customers' PCA requests in New England being "missed" by an average of 10 days, although AT&T had an average lead-time of 24 days to fill the requests. The shortages were discussed at a June 14, 1973 meeting of the Bell Interconnecting Equipment Coordinating Committee and the minutes of the meeting disclose recognition of "some very serious service complaints" and "extreme service problems" with certain PCA hardware.

We believe that the evidence thus revealed more than isolated "customer and vendor" complaints; Litton's evidence tended to show that AT&T was aware of PCA supply problems and failed to take the steps necessary to correct them. In view of AT&T's own policy of requiring interconnection only through a PCA, we do not think it was unreasonable for the jury to conclude that these shortages were orchestrated to frustrate Litton and other terminal equipment competitors.

The jury could also reasonably have inferred from the evidence introduced by Litton that some of AT&T's practices in connection with "inside wiring"—i.e., wiring owned by AT&T but located on or in a customer's

premises—were anticompetitive. AT&T professed its willingness to sell the wiring if a customer wanted to "cut over" from AT&T to a competitor's equipment, but Litton's evidence tended to show, first, that AT&T would often negotiate in bad faith by quoting unreasonably high prices for the wiring and, second, that in "many, many instances" AT&T chopped this wiring off flush with a customer's walls. Indeed, a South Central Bell general manager noted at one point that the practice of destroying inside wiring was "unreasonable and could very well be interpreted as . . . vindictive." That is the conclusion the jury reached and we see no reason to overturn it.[42]

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[42] AT&T argues that the only evidence was that on three isolated occasions one operating company, Southwestern Bell, chose not to sell its cable to Litton but that even as to these instances there was no showing of bad faith on Southwestern Bell's part; again the evidence is argued to be insufficient under *Berkey*. But the former Litton BTS Vice President of Operations said:

> In installations, we would find that when a customer was having the Bell system removed, the Bell folks would just come in like with an axe and just chop up the multipin connector wiring at walls. Gosh, darndest thing I ever saw. Just couldn't believe people would do that. That particular thing we tended to get over over a period of time and we ended up up [sic] some coordination meetings to try get the Bell folks to leave the premises on a reasonable basis as opposed to one of appearing to be mad.

He added that:

> A. It wasn't one customer. It was many many installations where that would occur and I just do not remember.
>
> Q. Did you ever observe that situation?
>
> A. Yes. Because I couldn't believe it, so I went and looked myself.
>
> Q. How often did you do that?
>
> A. Twice.
>
> . . . .
>
> Q. When you referred to damage, is it the same damage at each customer's premises?
>
> A. The two that I observed was the same damage and that was just going along and cutting the wires at the walls.
>
> Q. When you say cutting the wires at the walls, can you be a bit more specific about the nature of the damage?

Finally, AT&T argues that Litton failed to introduce sufficient evidence to justify the jury's conclusion that AT&T's delay in making "cutovers"—the final step involved in switching from AT&T to non-AT&T equipment—was anticompetitive. The record indicates, however, that Litton introduced, *inter alia*, testimony from representatives of various terminal equipment competitors to the effect that cutover delays frustrated their attempts to install equipment on schedule. The jury could have concluded from this and other evidence of intransigent cutover practices that AT&T's conduct injured Litton and other terminal equipment competitors.[43]

AT&T takes the position that these practices amounted to no more than *de minimis* injury under *Berkey Photo Inc.*, 603 F.2d at 288-89; *see also Federal Prescription Service Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 268-71 (D.C. Cir. 1981), *cert. denied*, 50 U.S.L.W. 3587 (U. S. Jan. 25, 1982). We disagree. AT&T's *seriatim* attacks upon the jury's findings invite us to approach Litton's proof as if this case involved "completely sepa-

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A. Yes. There are pairs of wires that are grouped together in cables and are wrapped in some plastic covering that come to a key phone or single phone or whatever, different size connectors. They would be chopped right off at the wall so you had no capability of coming to those wires with your connectors and so forth, even though you might be purchasing a cable from them.

43 AT&T points to *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 94 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1438 (1982), where we set aside a jury verdict because the plaintiff "introduce[d] [no] evidence whatsoever" that an AT&T affiliate provided poor service to the plaintiff's customers *after* the purchase and installation of the plaintiff's terminal equipment. But Litton's claim is that shortages, missed cutover dates, etc., prevented it both from satisfying existing customers and luring prospective customers because it could not "cutover" on schedule. Unlike *Northeastern*, there is evidence in this case to support Litton's claim that the problems associated with delay were real.

rate and unrelated lawsuits . . . tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co.*, 370 U.S. at 698-99. But on the basis of any one of these practices—all of which were supported by sufficient evidence—the jury could have reasonably concluded that Litton suffered competitive injury.[44] The jury's finding that this conduct was predatory, i.e., undertaken with an anticompetitive intent in an attempt to injure Litton, is all the more reasonable given the synergistic nature of these practices in relation to Litton's primary claim that it was excluded from the terminal equipment market. AT&T argues at length that Litton failed to prove that the shortages, delays, and inside wiring episodes were deliberate, but this ignores the fact that "[c]ircumstances in which intent can be inferred other than from conduct which is itself exclusionary will no doubt be rare. . . . [T]he relationship between intent and conduct is intimate: thought enlivens the deed; it can also be inferred from the deed." L. Sullivan, Antitrust § 39, at 105 (1977).

E. *Evidentiary Rulings*

AT&T challenges several of the trial court's rulings on the admissibility of evidence, arguing that the exclusion or limited admission of some evidence prevented it from proving that Litton chose to leave or was driven from the terminal equipment market because of adverse publicity resulting from a bribery scandal and other corrupt practices. AT&T also maintains that the trial court judge erred

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[44] *See Northeastern Telephone Co.*, 651 F.2d at 95 n.28, *citing California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979) (holding that no synergistic effect arises from individual allegedly anticompetitive practices where proof in numerous critical aspects is utterly lacking).

in admitting some evidence that was unduly prejudicial to AT&T while excluding similar evidence favorable to AT&T on the issue of the reasonableness of the PCA requirement. The cumulative effect of these errors, AT&T argues, requires reversal. We deal with these arguments in the order advanced by AT&T.

1. *Exclusion of the Roberts Notes*

In 1973 Litton conducted an internal investigation of possible employee misconduct related to the sale of Litton terminal equipment. A Litton attorney, Norman Roberts, made notes of his interviews with various Litton employees during the course of this investigation. AT&T argues that these notes constitute a "devastating admissio[n]" against Litton insofar as they reveal that Litton employees gave potential customers "calculators, girls and anything else" to make a sale, that "sales morale and performance [were] . . . way down," and that "skimming" and "funny deals" were commonplace. AT&T claims that the notes were admissible under Federal Rule of Evidence 801(d)(2)(D), which excludes from hearsay "admission[s] by [a] party-opponent" in the form of statements made by a party's "agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."

AT&T's claim that Roberts' notes—which summarized what various Litton employees recounted to him about wrongdoing on the part of other Litton employees—were admissible because the multiple levels of hearsay were all made in the course and scope of employment, is not persuasive. *See Northern Oil Co. v. Socony Mobil Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965). The fact that Roberts summarized what some Litton employees said about other employees in the course of his investigation does

not bring the events he summarized within the "scope of his agency or employment" under 801(d)(2)(D). *See* J. Weinstein, 4 Evidence 801-164 (1981) ("Gossip does not become reliable merely because it is heard in an office rather than a home.") The hearsay which he summarized may well have been inadmissible even if testified to by the employees interviewed. *See Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 80 n.3 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981). In any event, AT&T made no attempt at trial to lay the necessary foundation for the admission of the notes under 801(d)(2)(D) or any other rule, and simply argues here that the terms of 801(d)(2)(D) were satisfied. We decline to hold that the trial court committed reversible error by failing to admit the notes, either for their truth or otherwise, particularly in view of the fact that AT&T could have overcome the trial court's objections by examining Roberts himself or those Litton employees he interviewed. *See Litton Systems, Inc. v. . T&T Co.*, 91 F.R.D. 574, 578 (S.D.N.Y. 1981). We note that while Judge Kearse disagrees with our hearsay analysis, she agrees that there was no reversible error.

2. *The San Mateo Bribery Incident*

In November of 1973 four of Litton's executives in its terminal equipment division were indicted for paying bribes to an employee of the state college system in San Mateo, California. The trial court permitted AT&T to prove that the officials were indicted and subsequently discharged, but excluded evidence of the bribery under Federal Rule of Evidence 403 because of its emotional and prejudicial content. We note that the trial court at one point indicated that it would consider admitting the bribery evidence if AT&T would allow Litton to offer

proof that AT&T had bribed public officials; AT&T declined the offer. Plainly the trial court did not abuse its discretion in excluding this evidence.

3. *The Mellor Memorandum*

AT&T argues that the trial court erred in not admitting for its truth a memorandum taken by James Mellor, a Litton senior vice-president, that summarized Mellor's conversation with Leonard Mende, one of the Litton BTS (Business Telephone Systems) executives who had been discharged as a result of the San Mateo incident. Mellor's notes of this conversation indicate that he told the discharged executive that the San Mateo scandal had "screwed up a very promising business activity." The trial court admitted the memorandum for the purpose of showing what Mellor had said to Mende, but refused to admit the memorandum for its truth—i.e., as proof that the San Mateo scandal caused Litton to leave the terminal equipment market. AT&T makes the same argument under 801(d)(2)(D) with respect to this evidence that it makes with respect to the Roberts notes, and the reservations we expressed earlier are applicable here. In any event, Mellor himself testified that the contents of the memorandum accurately summarized what he said, and the memorandum was examined by the jury and quoted in AT&T's opening and closing arguments. We therefore cannot see how AT&T was prejudiced by the trial court's decision not to admit the memorandum for its truth.

4. *The Selph Deposition*

The trial court granted AT&T special leave to take the deposition of a Litton employee who had been discharged in connection with the San Mateo incident. In granting

AT&T's request to take this deposition, the trial court limited discovery to those matters made relevant as a result of Litton's eleventh-hour disclosure of the Roberts notes. AT&T argues that some of Selph's deposition testimony that the PCA device had no effect on Litton's sales should have been admitted, particularly in view of the fact that the trial court allowed Litton to introduce deposition testimony outside the scope of a similar special leave. We attribute this difference in treatment to a difference in the content of the testimony. In granting special leave to take the Selph deposition the trial court imposed certain limitations that AT&T ignored; the discretion involved in reopening discovery could be cast aside if parties could ignore such limitations with impunity. In any event, the cumulative nature of the evidence excluded belies any claim that AT&T was prejudiced.

5. *Admission of Hoxie's Testimony*

AT&T contrasts the trial court's exclusion or limited admission of all of the above evidence with the admission of testimony by Lowell Hoxie, a former Litton vice president in charge of the terminal equipment division's marketing and administration group. Hoxie testified that problems associated with defective PCAs, short supply, and missed delivery dates imposed "incredible cost[s]" on Litton, the effects of which were "devastating" to Litton's efforts to establish itself in the terminal equipment market. The trial court rejected the argument that this testimony was inadmissible as hearsay because, although Hoxie testified in part from recollection of oral reports made by subordinates, much of his testimony was based on first hand knowledge and observation or reports made in the ordinary course of business. The testimony was therefore admitted under Federal Rule of Evidence

803(24), which provides for the admission of hearsay statements not specifically enumerated in Rule 803. The trial court found that the testimony had sufficient "circumstantial guarantees of trustworthiness," Fed. R. Evid. 803(24), to justify its admission because the reports, even if oral, were made in the ordinary course of business. The court also explained that it was doing so to avoid the "expensive and very inefficient" alternative of "call[ing] enough witnesses to furnish non-hearsay substantiation of [the] summary" offered by Hoxie. Thus, although the trustworthiness of recollections of the sort Hoxie's testimony contained is open to question, *see Bowman v. Kaufman*, 387 F.2d 582, 586-87 (2d Cir. 1967), the potential hearsay taint of Hoxie's testimony is not sufficient to justify reversal.

6. *Evidence Relating to the Reasonableness of the Interface Tariffs and AT&T's Opposition to Certification*

AT&T objects to the trial court's treatment of three other items of evidence, all of which were offered by either AT&T or Litton as bearing on the reasonableness of the interface tariffs or AT&T's opposition to certification standards. The first ruling to which AT&T takes exception is the admission of various FCC decisions that described AT&T's tariffs as "unreasonable," "illegal," "discriminatory," or "unlawful." Although the trial court excised the words "unlawful" and "illegal" at AT&T's request, it refused to remove portions stating, for example, that the interface tariff was "unnecessarily restrictive" and an "unjust and unreasonable discrimination." According to AT&T, the different meanings of "reasonableness" under the Sherman Act and the Communications Act justified its request to have these words

removed and the jury was unavoidably prejudiced by the trial court's failure to do so.

We agree with Litton that these decisions were central both to Litton's claim that the PCA device was unnecessary and Litton's rebuttal of AT&T's defense that the interface tariff was an attempt to comply with previous FCC rulings. The order excluding all portions of the FCC rulings stating that the tariffs were "unlawful" or "illegal" gave AT&T all to which it was entitled because the FCC continually held after *Hush-A-Phone* that AT&T's practices were not necessary to protect the telephone system. The findings thus directly undercut the predicate of AT&T's argument that the PCA requirement was "reasonable" under the antitrust laws because it was an attempt to follow regulatory policy. The findings were properly admitted under Federal Rule of Evidence 803(8)(C) as factual findings resulting from an investigation made pursuant to authority granted by law.[45] Moreover, the court's charge made it clear to the jury that the term "reasonable" as used in the rulings did not necessarily signify the same thing as "reasonableness" under the antitrust laws and were therefore not binding.

AT&T's second objection contrasts the admission of the above FCC decisions with the trial court's exclusion

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[45] AT&T cites to our decision in *City of New York v. Pullman Inc.*, 662 F.2d 910 (2d Cir. 1981) as support for the proposition that a finding made by a government agency for one purpose should be excluded from other proceedings considering the same or similar facts because of the undue weight a jury might accord such findings. In *City of New York*, however, we affirmed the trial court's exclusion of an interim staff report of a government agency because the report was "[b]y its own terms, . . . not the final report or finding of a government agency within the meaning of [Fed. R. Evid. 803(8)(C)]." *Id.* at 914. In the alternative, we noted that the trial court judge had not abused his discretion in deciding that admission of the report was inadvisable under Fed. R. Evid. 403. *Id.* at 915. Here, of course, there is no question that the FCC decisions are within the scope of 803(8)(C).

of a 1969 New York State Public Service Commission decision upholding the interface as a reasonable means of protecting the network against harm. The trial court excluded the 1969 decision upon its own motion on the grounds that the monthly charge for the interface considered there was fifty cents, as opposed to the average monthly charge of over six dollars for the interface device challenged in this case. AT&T argues that it was deprived of an opportunity to prove to the jury that AT&T was not alone in its belief that the interface device was absolutely necessary to protect the telephone system from harm. *Cf. Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 615 F.2d 1372, 1390 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980).

We view this evidence as arguably probative of AT&T's position, and find it difficult to justify the exclusion of this decision in light of the admission of the various FCC rulings. Although there is a considerable difference in cost between the two interface devices, this goes more to the weight to be accorded the evidence than its admissibility; any confusion or prejudice probably could have been avoided by appropriate instructions. But we are also mindful of the fact that this was a complicated and extensive trial, involving four and one-half years of pretrial proceedings, five months of trial, more than 18,000 pages of testimony and 945 exhibits. If a jury trial of this size and complexity is to be had at all, the trial court must have the discretion to limit the evidence at some point. We cannot find that this exclusion amounted to prejudicial error.

AT&T's final objection to the trial court's evidentiary rulings involves a 1976 report prepared by a former member of the PBX Advisory Committee. The report indicated, *inter alia*, that AT&T's competitors viewed

some of its practices in connection with the PCA requirement and general pricing scheme as anticompetitive. The trial court recognized that the report was hearsay, and therefore refused to admit it for its truth, but admitted the evidence for the limited purpose of showing what was reported to AT&T. But by 1976 Litton had left the terminal equipment market and the PBX Advisory Committee had completed its work. We therefore cannot see how the report bears on the only issue for which it could have been relevant, viz., whether AT&T knew that the Committee felt that AT&T's opposition to certification was in bad faith. Thus the ruling was erroneous, and the possible prejudicial effect—the report stated that AT&T's competitors felt that "Bell pricing has virtually killed the Interconnect market"—is troubling. We view the trial court's ruling as unfortunate, but do not believe that this ruling, or any of the other rulings, denied AT&T a fair trial even when considered collectively. Fed. R. Evid. 103(a); Fed. R. Civ. P. 61. *See, e.g., McKinnon v. Skil Corp.*, 638 F.2d 270, 276 (1st Cir. 1981) (ruling, if erroneous, harmless as not affecting "substantial rights").

F. *The Verdict for Litton as Customer*

In addition to the injuries it sustained as AT&T's competitor, Litton alleged that it was entitled to recover $491,778.57 spent for the installation and rental of AT&T interfaces on its own, internal telephone equipment for the eleven year period running from January 1, 1969 to the end of 1979. The jury awarded Litton exactly six-elevenths of this amount, $268,243, possibly reflected in the jury's initial determination that AT&T opposed certification in bad faith from and after 1973 until the end of 1978. We do not, for reasons stated in our discussion of Litton's claims as a competitor, believe that this verdict

should be overturned on *Noerr-Pennington* grounds. But AT&T offers us three other reasons—one factual and two legal—to overturn the verdict. We reject each of them in turn.

AT&T's first argument goes to the sufficiency of the evidence supporting the jury's verdict.[46] Specifically, AT&T complains that the evidence was insufficient because Litton failed to itemize its expenses for the charges on an annual basis. AT&T waived this objection by failing to challenge the figures or request that the witness presenting them break them down. Fed. R. Civ. P. 46. Taking another tack, AT&T argues that Litton should have mitigated its damages by removing the interface devices as soon as the tariff requiring them was invalidated.[47] Aside from being inconsistent with its earlier argument that the jury apportioned the damages without evidentiary support, this argument cannot succeed because Litton's failure to remove the devices is readily explicable on the grounds that the expense of removal—

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[46] AT&T argues that the jury had no rational basis for apportioning damages as it did because "the vast majority" of PCA charges could have occurred in years the jury thought it had excluded from consideration. Brief at 125 & n.117. This could be correct but in the absence of a breakdown we or the jury might just as easily have assumed that the vast majority of charges could have occurred in the six years 1973-78 which AT&T says were the years utilized by the jury. In any event in light of the jury's later finding that the PCA tariffs were filed in bad faith the ultimate award seems to err on the low side, if any. We assume that AT&T does not want a retrial limited to this issue.

[47] An antitrust plaintiff has a duty to mitigate damages. *See Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 398-99 (2d Cir. 1980); *Triebwasser & Katz v. American Telephone & Telegraph Co.*, 535 F.2d 1356, 1360 (2d Cir. 1976). But if AT&T is correct that the jury's award reflects a six-year period running only from the beginning of 1973 until the end of 1978, when the FCC order setting aside the last protective circuitry requirement became final, the damage award was fair. Moreover, failing to mitigate was an affirmative defense which AT&T omitted either to plead or prove.

some of the devices were permanently wired into the equipment—might have exceeded the savings resulting from removal.

AT&T's second argument against the verdict for Litton as customer relies on the "filed tariff" doctrine announced in *Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922). There the Supreme Court held that a shipper could not recover under the antitrust laws for injuries sustained as a result of allegedly unreasonable rates that had been filed with and approved by the Interstate Commerce Commission. We have recently held, however, that the *Keogh* doctrine is inapplicable to ultimately "disapproved tariffs . . . when . . . the regulatory agency expressly refuses to commit itself pending investigation." *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981). In reaching this conclusion we relied, in part, upon our decision in *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d at 83-84, which held that a tariff filing does not immunize a regulated entity from antitrust scrutiny, and in part on the lower court's opinion in this case, *Litton Systems, Inc v. American Telephone & Telegraph Co.*, 487 F. Supp. 942, 951 (S.D.N.Y. 1980). *See City of Groton*, *supra*, at 931. Unless otherwise advised by higher authority, we do not intend to disavow *City of Groton* or the import of our discussion on the interplay between regulation and antitrust immunity in *Northeastern Telephone Co.*

This case can be distinguished from *Keogh* and decisions holding the filed rate doctrine applicable, *see McLeran v. El Paso Natural Gas Co.*, 357 F. Supp. 329, 331-32 (S.D. Tex. 1972), *aff'd without opinion*, 491 F.2d 1405 (5th Cir. 1974); *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 769-771 (D. Del. 1979),

because the issue here is not the reasonableness of the interface tariff rate as compared to some other rate that might have been charged, but instead whether the PCA requirement itself was reasonable, i.e., whether there should have been any charge at all. We thus believe that the concerns expressed in *Keogh* involving the possible inconsistency between the operation of the antitrust laws and an independent regulatory scheme designed to fix reasonable rates under a statute are not implicated here. We therefore affirm the lower court's holding with respect to the inapplicability of the *Keogh* doctrine.

AT&T's third and final argument goes to Litton's standing to seek damages as a customer. Essentially, AT&T argues that when Litton donned a customer's hat it placed itself outside the "target area" that delineates one plaintiff from another in terms of standing to sue. The "target area" doctrine was first enunciated in *Billy Baxter, Inc. v. Coca Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971), where we stated that

> [A] plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal act. . . . These terms do not provide talismanic guides to decision but they do indicate the need to examine the form of violation alleged and the nature of its effect on a plaintiff's own business activities.

Customers are not *per se* outside the target area. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979); *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-15 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968);

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948). The test is ultimately one of directness. We have thus looked to whether the conspiracy was "aimed" at a particular entity in the area of the economy threatened by anticompetitive conduct, *see Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972), and to whether the injury in question was central to the attainment of the anticompetitive objective rather than a mere incident thereto, *see Schwimmer v. Sony Corp.*, 637 F.2d 41, 48-49 (2d Cir. 1980).

The Supreme Court has recently rejected an argument similar to the one AT&T makes here in connection with Section 4 of the Clayton Act. In *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723, 4726-27 (U.S. June 21, 1982) the Court recognized standing of a health insurance subscriber who was denied reimbursement for psychological therapy under a policy term providing reimbursement for such services only if they were rendered by psychotherapists. The petitioners in *McCready* adverted to the "target area" doctrine, citing our decision in *Calderone Enterprises, supra*. In holding that the petitioner's injury was not too remote the Court pointed out that the "target area" test does not "imply that it must have been the purpose of the [defendants] to injure the particular individual claiming damages," 50 U.S.L.W. at 4726 n.15 (citing *Schwimmer, supra*).

In this case, as in *McCready*, it avails AT&T little to argue that customers are outside the target area because the anticompetitive effect, if any, of the interface tariff was aimed at terminal equipment manufacturers rather than customers. While an intent to injure a specific entity may well be sufficient to satisfy the target area test, our

emphasis in *Schwimmer* on whether the injury was central to the attainment of the anticompetitive objective suggests that this is not always necessary. In this case, the jury found that AT&T imposed the interface tariff in order to maintain its monopoly position in the terminal equipment market. The tariff was "aimed" in the first instance at AT&T's customers in the sense that it applied to every user that chose to interconnect non-AT&T equipment. The tariff was perhaps the only way, and it was certainly the most efficient way, that AT&T could burden competitors seeking to establish themselves in the terminal equipment market. Thus, the injury to Litton as a customer was not remote even if injury to customers was not AT&T's first objective.

G. *The Damage Study*

AT&T argues that the damage award for Litton as a competitor must be overturned because it was based on a study that incorporated assumptions that were both unsubstantiated in the record and contrary to some of the jury's findings regarding the legality of certain AT&T practices. Litton's damage study, the so-called "Lost Profits Study," was prepared by Richard Hexter, whose substantial qualifications we set forth in the margin.[48] The two year study used a variety of sources to generate sales,

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[48] Hexter received his MBA from Harvard University and has taught graduate courses in finance and management at Columbia and Yale Universities. Prior to forming his own firm in 1975, Hexter worked for 15 years with Donaldson, Lufkin & Jenrette, an investment banking firm, where he served first as an industry analyst and later as the head of that firm's corporate financing, investment banking and venture capital division. Hexter was also familiar with the telecommunications industry as a result of his service as a board member of Arcata National Corporation and his study of Litton while he was with Donaldson, Lufkin & Jenrette.

profit, and market share data for Litton's position in the interconnection market from 1972 until 1990.

We note at the outset that the study was conservative in that it assumed that Litton would forego short term profits to achieve larger market shares and profits from 1979 on. The jury awarded Litton estimated profits up to and including 1978, in keeping with the trial court's instruction that Litton had an obligation to reenter the market when the interface tariff was finally set aside in 1978. We also note preliminarily, in order to provide some perspective on the magnitude of the telephone terminal equipment market and the jury's award, that Litton sustained an out of pocket loss of some $53 million before it left the market. Although we do not know AT&T's profits, its revenues from the sale of terminal equipment during this period was at one point in excess of $1.2 billion. By AT&T's own admission, Litton was the "number one formidable adversary" in this market and Hexter testified that if Litton had obtained a market share of even 6.9%, its 1982 profits alone would have been $37 million. Hexter's Lost Profits Study was typical of its genre in that it was based on an estimate of what Litton's experience would have been in the absence of the interface tariff (the "but for" world) as opposed to Litton's actual experience (the "real world").

As the only evidence introduced in support of Litton's damage claim as a competitor, the Hexter study conveniently provides a single target for the two salvos AT&T fires. The first is that the record fails to support certain assumptions upon which the study is based. The second is that the study incorporated assumptions regarding the absence of pricing and other practices that the jury either did not consider or determined not violative of the antitrust laws. We reject AT&T's argument that Litton's

damage study was based on unsupported assumptions or practices held lawful by the jury and affirm the jury's award.

1. *Support for the Hexter Study in the Record.*

AT&T argues that Hexter's projections—the heart of the Lost Profits Study—were based on a host of mutually independent assumptions which find no support in the record. The argument is that the Lost Profits Study should therefore not have been admitted and that the verdict must be set aside. *See Yentsch v. Texaco, Inc.*, 630 F.2d 46, 59 n.19 (2d Cir. 1980); *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906, 912-13 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). AT&T specifically attacks six "assumptions" of the Hexter study.

The first of these relates to Hexter's assumption that certification standards would have been adopted by early 1973 "but for" AT&T's opposition. AT&T argues that because various other groups also were opposed to certification, there is no evidence that AT&T's conduct was responsible for the FCC's failure to implement a certification program any earlier than it did. But Litton demonstrated that various AT&T executives admitted that they could have filed standards within a year of the *Carterfone* decision. This supports the premise, as not unreasonable or contrary to common sense, *see Auto West, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 566-67 (2d Cir. 1970), that if AT&T had behaved legally there would have been no interface device after early 1973.[49] The validity of this

[49] AT&T suggests that because other groups also opposed certification standards, Litton must prove a negative—*i.e.*, that this opposition had nothing to do with Litton's injury—in order to recover. Although Litton was required to prove a "causal connection" between its injury and AT&T's illegal conduct, it was sufficient to demonstrate that AT&T's conduct was a substantial or materially contributing factor.

premise is the very heart of the jury's verdict that AT&T filed the interface tariff and opposed certification in bad faith.

The second assumption AT&T challenges concerns the amount of money Litton would have invested in research and development in Hexter's "but for" world. As support, AT&T points to the Business Opportunity Plan Litton prepared before it entered the market. The plan called for an investment of $1,452,000 in research and development from 1972 to 1976, but Hexter assumed that Litton would have invested $14,828,000 in the same period. But of course R & D does not immediately bear fruit; by making a higher estimate of Litton's investment than was contemplated in the Business Opportunity Plan the effect was to *decrease* profits for Litton's early years in the terminal equipment market.[50] Because the jury only awarded damages for lost profits in the years from 1972 to 1978, to the extent that Hexter's study might have overestimated R & D investment, Litton rather than AT&T was disadvantaged. In any event, AT&T's reference to the Business Opportunity Plan only substitutes one set of assumptions for another. In fact, there was evidence in the record from the author of the Business Opportunity Plan that Litton had intended from the beginning to spend more on R & D than the plan projected. There was also testimony to the effect that Litton was ready to invest whatever was needed to make

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See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702 (1962).

50 Indeed, under the profit scheme in Hexter's model, Litton sustained *losses* in 1972 and 1973. We also note that Litton introduced evidence showing that its early performance in the terminal equipment market exceeded the projections contained in the Business Opportunity Plan and that R & D expenditures were increased accordingly.

the business succeed. The AT&T argument is thus both irrelevant and mistaken.

AT&T's third argument is that Hexter's assumptions about the size of the total terminal equipment market and Litton's share of that market were not supported by the record. But we note that damages in antitrust cases "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), thus bringing the elasticity of *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931), into play. *See also Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946). Accordingly, "where there is a basis on which a jury can reasonably infer significant antitrust injury, [the court] should be very hesitant before determining that damages cannot be awarded." *Berkey Photo, Inc.*, 603 F.2d at 304. Hexter's estimates were based upon a two year analysis of industry data available from Litton, AT&T, and public sources, and a review of more than thirty terminal equipment studies. His study projected that by 1978 AT&T would still have 79 percent of the terminal equipment market with the remaining 21 percent shared by all non-AT&T competitors. This estimate was conservative as compared to a study done by General Electric, which estimated that by as early as 1975 competitors would divide 30 percent of the market. Hexter's estimate of Litton's share of the total non-AT&T terminal market was also conservative; his estimates never exceeded 14.5 percent when in fact Litton's actual share before it left the terminal equipment market was at one point between 23 and 25 percent.

AT&T also complains about Hexter's treatment of Litton's bad debt costs. The argument is that Hexter ignored Litton's actual experience and postulated these

costs on the basis of a composite profile based on six well-run, thriving companies in high technology industries. For the limited time Litton sold and leased equipment, its bad debts amounted to almost 12 percent of its sales, while Hexter's model assumed that they would amount to less than 2 percent. According to Hexter's testimony, however, these companies were the six most comparable; three of them were actually in the terminal equipment business. We believe that Hexter's decision to use these estimated bad debt figures was based on the plausible assumption that Litton's actual experience in the start-up phase of its business was not representative of what those costs would be in later years.[51] We note in any event that Hexter's estimates of Litton's profits for the 1972 to 1976 period averaged less than 1 percent of sales, and the estimated profits of only 6.7 percent of sales for 1977 and 1978, was about half of AT&T's profits on its overall sales. We think that AT&T's argument as to Hexter's treatment of this single cost factor goes only to the weight of the evidence and does not compel rejection of the damage study or overturning the verdict. *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976).

The fifth Hexter assumption that AT&T challenges is that there would be "tough but equal" price competition and that Litton and other terminal equipment companies "would be able to compete profitably against whatever Bell tariffs were filed." AT&T argues that it had an

[51] That AT&T's objections go to the weight and not the validity of the evidence used in the study seems plain. From the more than one hundred cost, expense, and other factors Hexter used in his study, AT&T attacks one figure—bad debts as a percentage of sales—to challenge Hexter's treatment of costs. AT&T's argument that Hexter's model should have somehow reflected the fact that 80 per cent of all new businesses are unsuccessful is frivolous.

inherent pricing advantage and that therefore neither Litton nor any other competitor could compete equally. This court has, of course, emphasized that a monopolist may lawfully take advantage of benefits deriving from its size or integration, *see Berkey Photo, Inc.*, 603 F.2d at 276, but AT&T has completely mischaracterized Hexter's assumption. Hexter's assumption concerning "tough but equal competition between the products and the people in the field" related not only to pricing, but included "price and features." His assumption was that "the companies would compete on their ability to sell, properly install and service the equipment."

The assumption that Litton would have been able to compete successfully was borne out by Litton's initial success in the terminal equipment market and evidence tending to indicate that AT&T itself thought that some of Litton's products possessed desirable features that AT&T's equipment did not. Moreover, Hexter testified at trial that his assumptions as to Litton's ability to meet AT&T's competition in the non-price category of product capabilities were in fact conservative insofar as he assumed only that Litton would stay abreast of the competition after it had established a position in the market.

The sixth and final assumption AT&T challenges is Hexter's inclusion of lost profits attributable to Litton's leasing operation, Litton Industries Credit Corporation (LICC). AT&T argues that the only commodity essential to an equipment leasing business is money and that Litton's leasing subsidiary was therefore free to lease any other equipment—telephone terminal equipment or otherwise—that it could purchase. But in the real world—for the limited time that Litton was in it—Litton did lease as well as sell its equipment and the money that LICC used to purchase the equipment from Litton BTS was

obtained by financing. Litton introduced evidence to support the proposition that the leasing operation was essential to its market efforts because many customers preferred a leasing arrangement to outright purchase. AT&T's argument that Litton could have leased any other commodity puts the cart before the horse; Litton operated the leasing subsidiary to sell telephone equipment, and not *vice versa*. AT&T's contention that Litton should have leased another product is equivalent to saying that an antitrust plaintiff's recovery of lost profits is limited by the highest alternative return that a plaintiff could have secured in another line of business entirely. The leasing operation was part of Litton's terminal equipment business and whatever profits Litton's leasing operation lost as a result of AT&T's conduct are therefore properly included in the measure of damages.

In short, the Hexter study is supported by the record and not based on assumptions as to evidence not in the record. The Hexter study is not rendered inadmissible because AT&T would have calculated the damages in a different manner or used other figures. *See, e.g., Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 843 (7th Cir. 1978); *Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976). Under *Story Parchment*, *Bigelow v. RKO Radio Pictures*, and *Zenith Radio Corp.*, the verdict must be sustained. *Cf. Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 272 (2d Cir. 1959).

2. *Litton's Damage Study and AT&T Conduct Found Lawful: Causation.*

AT&T argues that the Hexter Lost Profits Study assumed the absence of AT&T practices that the jury either did not consider or did not find unlawful, e.g., pricing practices, disparaging advertising, and copying competitors' products. The argument, stated more simply, is that Hexter could not separate the lost profits related to lawful activity from the lost profits related to the unlawful interface and practices associated therewith. AT&T correctly points out that courts have held that damage studies are inadequate when only some of the conduct complained of is found to be wrongful and the damage study cannot be disaggregated. *E.g., Momand v. Universal Film Exchanges, Inc.*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949); *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 434, 436 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981).

But the record does not sustain the AT&T position. What Hexter assumed was that "to the extent that there were any marketing practices either related directly or indirectly to the interface device that may have been harassing or uncooperative," that these practices would not be present in the " 'but for' world." He made an effort to segregate how much in lost profits related to the interface and to pricing or marketing practices, but rejected it because he did not believe that the results were fruitful. He assumed that Bell would know its own costs and would price toughly but competitively and that companies challenging Bell would, everything else being equal, be able to compete and make a profit. He did not

assume that any particular AT&T pricing practices would be eliminated. In short, there is no evidence that Hexter assumed AT&T's prices were illegal or that he made specific assumptions about how individual AT&T pricing practices would have changed. AT&T did not submit contrary evidence. How else lost profits can be proved in an antitrust case, we are not told. In short, there was an evidentiary basis for the jury award which—all things considered—was modest in light of the fact that Litton's lost profits were limited to years prior to 1978. *See generally Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946), *Eastman Kodak Co. v. Southern Photo Material Co.*, *supra*, at 378-79.

H. *Sanctions on Litton for Failure to Provide Discovery*

The trial court upheld the magistrate's finding[52] that Litton's attorneys had engaged in a "pattern of intentional concealment of evidence" relating to the finder's fee investigation in connection with Litton's San Mateo office; the evidence specifically consisted of certain notes

[52] Litton argues that Magistrate Sinclair should have been disqualified from presiding over pretrial discovery because some four to seven years prior to this litigation he worked as an associate on a case that eventually resulted in Litton threatening to sue his law firm for malpractice. Our review of the record leads us to agree with Judge Conner that it "is not reasonably conceivable" that Sinclair was likely to be prejudiced against Litton as a result of this earlier involvement. Litton also argues that it was error to assign Magistrate Sinclair the task of conducting an evidentiary hearing on discovery order violations. While we may agree that it would have been better practice to assign this task to another magistrate, Magistrate Sinclair was clearly in the best position to review compliance with the 122 discovery orders issued in this case. The district court reserved to itself the question of what sanctions would be imposed for any discovery violations; Sinclair's review of the record did not exceed the scope of authority granted to magistrates under 28 U.S.C. § 636(e)(5) (Supp. IV 1980) (magistrate may certify to the district court facts relating to "act or conduct which if committed before a judge . . . would constitute contempt").

that were in the bottom of the drawer of in-house counsel Roberts until the late summer of 1979. *See Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 90 F.R.D. 410 (S.D.N.Y. 1981). The court concluded that the Roberts notes were material to preparation for AT&T's defense that Litton BTS went out of business as a result of mismanagement, incompetency and dishonesty, rather than as a result of AT&T's antitrust violations. It found other Litton in-house counsel grossly negligent for stating in connection with the taking of Roberts' deposition that there were no other relevant documents, without having reviewed all of Roberts' files; in representing in an April 24, 1978 brief that the Bruder investigation (after the then new President of Litton BTS, Robert Bruder) in 1973 was directed only at the San Mateo matter when in fact San Mateo was only one of seven instances of suspected misconduct Bruder wanted investigated; in representing in the same brief that all of Roberts' interview notes had been turned over to the San Mateo County District Attorney when in fact the notes of Roberts' interviews with five Litton BTS employees had not been turned over; in representing in another brief filed December 6, 1978 that Litton had produced all "notes and memorandums of interviews of persons not connected with the San Mateo matter;" in failing to turn over to AT&T Roberts' notes following the court's opinion and order of March 26, 1979, which specifically rejected the argument that work product immunity attached to the interview reports; in representing in a letter of July 6, 1979 that Roberts had taken no notes of his interview with Litton BTS employee Hoxie when in fact Hoxie had testified that he had been interviewed. The court also found "willful misconduct" on the part of Litton's general counsel in this litigation; after receipt of the complete set of Roberts' interview

notes in the late summer of 1979, counsel failed to apprise the magistrate, the district court and the defendants of the existence of the additional notes to correct the earlier erroneous assertions that had been made. Even after production of handwritten copies of Roberts' notes of interviews with certain Litton BTS employees, the entire notes were not produced and it was claimed that the notes withheld involved matters "wholly extraneous" to the case, when in fact they also involved notes on the use of fake finders, finders' fees and other matters. But the court refused Bell's requested sanction of dismissal and instead denied Litton recovery of all costs and attorneys' fees to which it would otherwise be entitled as a matter of law, including those under Section 4 of the Clayton Act, 15 U.S.C. § 15. *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 91 F.R.D. 574 (S.D.N.Y. 1981).

Needless to say, the parties disagree entirely on the sanctions imposed. AT&T would have the action dismissed and Litton disentitled to recover one dime, a sanction which is within the court's discretion to impose. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (per curiam); *Penthouse International, Ltd. v. Playboy Enterprises Inc.*, 663 F.2d 371, 386-92 (2d Cir. 1981); *Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062 (2d Cir. 1979). Litton argues that a penalty of over $10 million is excessive, especially where counsel supervised the disclosure of three and one half million documents in a professional manner and where the notes were ultimately turned over without any prejudice to AT&T by virtue of their late production because the notes (a) were inadmissible hearsay, (b) contained no specific information, and (c) were unimportant because the whole subject of finders' fees was mentioned only once in the course of

an entire five hour summation by AT&T counsel before the jury. Litton also argues that under *Upjohn Co. v. United States*, 449 U.S. 383 (1981), decided since the district court's sanctions orders were made, the miscellaneous notes were, in fact, privileged and should never have been turned over to AT&T at all, as Litton had consistently urged the magistrate and district court with the agreement of the magistrate in the first instance.[53]

We affirm the district court in this regard. The payment of attorneys' fees is a part of the penalty for violating the antitrust laws. *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 859-60 (7th Cir. 1981); *Farmington Dowell Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61, 90 (1st Cir. 1969). At the same time there is no doubt that attorneys as officers of the court must operate on an honor system, *Litton Systems, Inc. v. AT&T Co.*, 90 F.R.D. at 417 (S.D.N.Y. 1981), and must be appropriately disciplined to provide both specific and general deterrence. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980); *National Hockey League v. Metropolitan Hockey Club, Inc.*, *supra* at 643. Federal Rule of Civil Procedure 37(b) expressly empowers the court to impose a wide range of specified sanctions for failure to obey court orders. *See Roadway Express, Inc.*, *supra*, at 763-64; *Stanziale v. First National City Bank*, 74 F.R.D. 557

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[53] Litton contends that the Roberts notes should have been protected as attorney work product under *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (when house counsel and general counsel interviewed middle-echelon corporate employees regarding possible foreign government bribes, notes of the interviews held privileged as made between attorney and client). But as Litton concedes, Litton Brief at 121, the internal investigation focused on the employees' own possible misconduct; they were not speaking on behalf of the corporation or in furtherance of its business. The "remote possibility" of criminal litigation involving Litton itself was not sufficient to create a work-product immunity, *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974).

(S.D.N.Y. 1977). Given the court's express findings of bad faith, it could also have imposed sanctions on Litton as an exercise of its inherent powers. *See Roadway Express, Inc., supra*, at 764-67. It is immaterial that the notes themselves were ultimately ruled inadmissible on the ground that they were hearsay since they were "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Thus where there is repeated defiance of express court orders dismissal may be an appropriate remedy. *National Hockey League, supra*, at 640 (refusal for 17 months to answer "crucial" interrogatories); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 666 (2d Cir. 1980) (doing "absolutely nothing at all" to comply with discovery orders or move the case to trial); *Cine Forty-Second Street, supra* (refusal for three years, without moving for protective order, to comply with specific orders to answer interrogatories on damages).

At the same time, because dismissal denies the party access to justice, if the party has a valid claim, dismissal would, in the case of attorney misconduct such as gross negligence, amount to a windfall to an adversary to be resorted to only when necessary to preserve the integrity of the judicial system, or in similar "extreme circumstances." *Interconex, Inc. v. Federal Maritime Commission*, 572 F.2d 27, 30 (2d Cir. 1978); *Israel Aircraft Industries, Ltd. v. Standard Precision*, 559 F.2d 203, 208 (2d Cir. 1977); *Independent Productions Corp. v. Loew's Inc.*, 283 F.2d 730, 733 (2d Cir. 1960). *See also Cine Forty-Second Street*, 602 F.2d at 1064 (dismissal should "be deployed only in rare situations"). Thus the trial court in imposing sanctions expressed its agreement with the concurring opinion in *Cine Forty-Second Street* that it

is difficult to "visit upon the client the sins of counsel, absent client's knowledge, condonation, compliance, or causation." *Id.* at 1069.

We believe that the trial court, thoroughly familiar with the record, the parties, as well as the efforts, conduct and omissions of counsel, quite correctly struck a wise balance between the conflicting interests in imposing antitrust penalties under the Clayton Act on the one hand and preserving the integrity of the discovery process on the other. Dismissal of the case would be inappropriate in the light of the limited ultimate role that the Roberts notes played. The imposition of the sanction of no award of attorneys' fees and costs is expensive for Litton, to be sure, but the failures and obstructions of house counsel Roberts, house counsel's conduct at the taking of Roberts' deposition, and the conduct of general counsel, found by the district court in its familiarity with the record and these parties to constitute gross negligence and willful misconduct, led to the sanction. Thus while the damages and hence statutory attorneys' fees in this case are so substantial that in effect Litton (or perhaps to some extent counsel) is being penalized in a sum that on its face is larger than 99 percent of the judgments awarded in any court, it is still only a small fraction of the ultimate recovery here involved. Indeed, where the stakes are as high as they are in this case, the penalties for obstruction of the truth must be impressive if they are to be effective, yet they must not be so drastic or unfair as the penalty of dismissal. Indeed, in such a case, dismissal is so unlikely to be imposed that, absent steep penalties, Rule 37 would be at most a "paper tiger." Rosenberg, *New Philosophy of Sanctions*, in New Federal Civil Discovery Rules Sourcebook 140, 141 (W. Treadwell ed.

1972). We believe that the trial court acted soundly and correctly, as well as wisely, in imposing the sanction. We decline to set it aside on behalf of either party.

In view of our disposition of the case we need not reach the issues on Litton's cross appeal.

Judgment affirmed.

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APPENDIX B

District Court's Opinion Denying The Motion To Dismiss And Motion For Partial Summary Judgment

LITTON SYSTEMS, INC. et al., Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY et al., Defendants.

NEW YORK TELEPHONE CO., INC. et al., Counterclaimants,

v.

LITTON SYSTEMS, INC. et al., Counterdefendants.

No. 76 Civ. 2512 (WCC).

United States District Court, S. D. New York.

March 4, 1980.

Theodore F. Craver, Larry L. Yetter, Litton Industries, Inc., Beverly Hills, Cal., Howrey & Simon, Washington, D. C., Curtis, Mallet-Prevost, Colt & Mosle, New York City, for plaintiffs; William Simon, John Bodner, Jr., Francis A. O'Brien, Ralph Gordon, Kevin P. McEnery, Washington, D. C., Peter E. Fleming, Jr., New York City, of counsel.

Dewey, Ballantine, Bushby, Palmer & Wood, New York City, for defendants; Leonard Joseph, O. Nile Bell, J. Paul McGrath, Harvey Kurzweil, New York City, of counsel.

OPINION AND ORDER

CONNER, District Judge:

This antitrust action is before the Court on objections filed by both sides, pursuant to 28 U.S.C. § 636(b)(1), to the Recommended Decision of Magistrate Kent Sinclair, Jr. submitted September 21, 1979, on defendants' motion for judgment of dismissal on the pleadings or for partial summary judgment.

The complaint charges violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by conspiring and attempting to restrain trade in and to monopolize, and by monopolizing, the interstate sale and leasing of telephone terminal equipment, including private branch exchange ("PBX") and key telephone system ("KTS") equipment designed to interconnect defendants' telephone trunk lines selectively with a number of individual telephones within an office, store, plant or other facility. The complaint alleges that defendants sought to and did accomplish these illegal objectives by, *inter alia,* (1) filing with the Federal Communications Commission ("FCC") and with state regulatory agencies self-effectuating tariffs which provided that terminal equipment supplied by others could be interconnected with defendants' trunk lines only if there was interposed between them an interface device provided and maintained by defendants, said tariffs being supported by "incomplete, misleading and erroneous information"; (2) falsely disparaging the terminal equipment offered by competitors, including plaintiffs; (3) deliberately making the required interface equipment unnecessarily complicated, expensive and inefficient and delaying its production, installation and service; (4) predatorily pricing defendants' terminal equipment below its production cost; and (5) depriving plaintiffs of fair access to state regulatory agencies by improper payments to officials thereof and illegal political contributions.

Plaintiff Litton Systems, Inc. ("Litton") is a Delaware corporation with its principal office in Beverly Hills, California, selling products and services in a wide range of business areas, including aerospace, communications, computers, shipbuilding and minerals exploration. Until 1974, its wholly-owned subsidiary, plaintiff Litton Business Telephones System, Inc. ("BTS") manufactured and sold telephone terminal equipment in competition with defendants. The complaint alleges that BTS sustained losses and eventually went out of business as a result of defendants' antitrust violations.

Defendants (collectively referred to hereinafter as "AT&T" or ("Bell") include American Telephone & Telegraph Co.; its manufacturing subsidiary, Western Electric Company; its research subsidiary, Bell Telephone Laboratories, Inc.; and seven of its fully- or majority-owned regional operating companies. Intrastate telephone service is provided by the regional operating companies, whose rates and practices operations are controlled by state and local regulatory agencies, while interstate service is provided by AT&T's Long Lines Division under regulation by the FCC.

After extensive discovery, defendants moved for judgment of dismissal on the pleadings on the grounds that all aspects of operation of the Bell system, specifically including the interconnection of equipment thereto, are subject to pervasive regulation by the FCC and by state regulatory commissions, and that the purposes of such regulation are incompatible with the objectives of the antitrust laws, so that such activities are impliedly immune from the antitrust laws under the doctrine of such decisions as *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963) (*"Pan Am"*); *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973) (*"Hughes Tool"*); *Gordon v. New York Stock Exchange,* 422 U.S. 659, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (*"Gordon"*); *United States v. National Association of Securities Dealers,* 422 U.S. 694, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975) (*"NASD"*) and *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as specifically applied to the regulation of the market in ancillary telephone equipment in such cases as *Essential Communications Systems, Inc. v. American Tel. & Tel.,* 446 F.Supp. 1090 (D.N.J.1978), *rev'd,* 610 F.2d 1114 (3d Cir. 1979) rehearing denied, No. 78—2521 (3d Cir., filed November 23, 1979). Defendants alternatively moved for partial summary judgment or judgment on the pleadings on the ground that their alleged activities in attempting to influence administrative action were shielded from antitrust liability by the First

Amendment under the *"Noerr-Pennington"* doctrine established by *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) (*"Noerr"*) and reaffirmed in *United Mine Workers v. Pennington,* 381 U.S. 657, 669–70, 85 S.Ct. 1585, 1592–93, 14 L.Ed.2d 626 (1965) (*"Pennington"*). Plaintiffs, on the other hand, contend that defendants, by their false and misleading submissions to the regulatory agencies, have attempted to subvert the regulatory process, so that the "sham" exception to the *Noerr-Pennington* doctrine, recognized in such cases as *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972) ("California *Motor Transport*"), is applicable.

The motions were referred to Magistrate Sinclair for recommended decision pursuant to 28 U.S.C. § 636(b)(1)(B). In an unusually exhaustive and meticulous Recommended Decision 270 pages in length, exclusive of a 58-page appendix, Magistrate Sinclair recommended granting of the motion and dismissal of the entire complaint. He concluded that plaintiffs' "core" claims relating to defendants' activities before the FCC and the state regulatory commissions were immunized from antitrust liability in view of the pervasive regulation of the industry and because the specific conduct in question had, for the most part, been expressly sanctioned by the responsible agencies. He further recommended that the "Peripheral" claims relating to defendants' alleged "business torts" such as disparagement of competitive terminal equipment be dismissed as ancillary to the "core" activities and likewise subject to remedial action by the agencies.

In the alternative, Magistrate Sinclair recommended stay of the action and referral of all the claims therein to the FCC for consideration in the first instance, pursuant to the principle of primary jurisdiction, as articulated, for example, in *United States v. RCA*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1958).

The Magistrate further recommended denial of defendants' motion for partial summary judgment under *Noerr-Pennington*

on the ground that there were material issues of fact bearing on the "sham" exception, particularly with respect to defendants' intentions relative to their challenged activities before the regulatory agencies.

In support of and in opposition to their exceptions to the Recommended Decisions, the parties have made massive and numerous written submissions. After due consideration thereof, and of the authorities cited therein, the Court has concluded, with due deference to the painstaking and conscientious effort of Magistrate Sinclair, that his recommendations that the action be dismissed on grounds of implied antitrust immunity or stayed pending referral for initial review by the FCC cannot be adopted. His recommended denial of defendants' motion to dismiss under the *Noerr-Pennington* doctrine is adopted. Defendants' motions are therefore denied in their entirety.

IMPLIED IMMUNITY

General Principles

There is an inherent and obvious tension between the emphasis on unrestrained competition underlying the antitrust laws and the "public interest" rationale underlying other instances of governmental regulation of business activity. The Sherman Act is premised on the theory that "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources," *Northern Pacific Ry. v. United States,* 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958), and, to some extent, on the political and social desirability of smaller, competitive businesses, see *United States v. Falstaff Brewing Corp.,* 410 U.S. 526, 540–43, 93 S.Ct. 1096, 1104–06, 35 L.Ed.2d 475 (1973) (Douglas, J., concurring in part); *Northern Pacific Ry., supra,* 356 U.S. at 4, 78 S.Ct. at 517. The assumption underlying economic regulation, on the other hand, is that unrestrained competition in certain industries will not adequately serve the public interest either because the activity involved is, from the standpoint of

economic efficiency, a "natural monopoly" (certain utility activities, for example, see *Otter Tail Power Co. v. United States,* 410 U.S. 366, 369, 93 S.Ct. 1022, 1025, 35 L.Ed.2d 359 (1973)); or because the business conduct involved should be judged by criteria other than or in addition to competitiveness, such as convenience to the public or nondiscrimination in providing services (*e. g.*, certain activities of common carriers, see *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439, 453, 456–67, S.Ct. 716, 725–30, 89 L.Ed. 1051 (1945)), or the industry's importance to foreign commerce of the United States (*e. g.*, the shipping industry, see *Far East Conference v. United States*, 342 U.S. 570, 573, 72 S.Ct. 492, 493, 96 L.Ed. 576 (1972); Note, *Antitrust and the Shipping Industry*, 12 N.Y.U.J. Int'l L. & Pol. 115 (1959)), or the economic health of the regulated industry, see, *e. g.*, *Gordon, supra*, 422 U.S. at 689, 95 S.Ct. at 2614 (protection of investors and stock exchanges). See generally II A. Kahn, The *Economics of Regulation: Principles and Institutions* (1971). Where Congress has established a regulatory agency to supervise the conduct of business within an industry according to a standard of "public interest," therefore, subjecting a regulated firm to antitrust liability based on competitiveness factors alone, as the antitrust laws require, see, *e. g.*, *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978) (§ 1 case), may result in imposing on the business standards of conduct inconsistent with those established by Congress for that industry.

[1] Regulated industries "are not per se exempt from the Sherman Act," *Georgia v. Pennsylvania R. R. Co.*, 324 U.S. 439, 456, 65 S.Ct. 716, 725, 89 L.Ed. 1051 (1945), even if the specific conduct complained of has been expressly approved by the agency charged with regulatory responsibility. *United States v. Radio Corp. of America*, 358 U.S. 334, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959). Rather, a court determining the applicability of the Sherman Act to a regulated industry must consider whether and to

what extent Congress intended to exempt activities of that industry from the antitrust laws.

In some industries, Congress has recognized the potential for conflict between the regulatory statutes and the antitrust laws and has expressly granted antitrust immunity for specified conduct; for example, in the interstate telephone field, FCC-approved mergers of telephone companies are expressly exempted. 47 U.S.C. §221(a) (1970). No such express immunity is claimed in this case.

[2] Courts have, in addition, found an implied antitrust immunity for certain activities in other industries covered by a regulatory scheme. Such immunity has been implied in two restricted instances: (1) when the agency's regulation of the industry is so pervasive that Congress may be assumed to have determined that unrestrained competition will not adequately protect the public interest, see *Otter Tail Power Co., supra,* 410 U.S. at 373–4, 93 S.Ct. at 1027–28; *Silver v. New York Stock Exchange,* 373 U.S. 341, 358–60, 83 S.Ct. 1246, 1257–1258, 10 L.Ed.2d 389 (1963); *RCA, supra,* 358 U.S. at 348–49, 79 S.Ct. at 465–66; see also *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 584, 96 S.Ct. 3110, 3114, 49 L.Ed.2d 1141 (1976) (discussion of pervasive state regulation); or (2) when a regulatory agency is authorized by statute to exercise, and has in fact exercised, authority over the particular practice under attack (as contrasted with the general field of activity) in a way which effectuates the regulatory scheme, *Gordon, supra; NASD, supra; Pan Am, supra; Keogh v. Chicago & Northwestern Ry. Co.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922); see *Silver, supra,* 373 U.S. at 361–63, 83 S.Ct. at 1529–60.

The Supreme Court has articulated an exacting standard for the implication of antitrust immunity: "Repeal of the antitrust laws is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory

.provisions' will repeal be implied." *Gordon, supra,* 422 U.S. at 682, 95 S.C.T. at 2611. "Repeal is to be regarded as implied only if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary." *Silver, supra,* 373 U.S. at 357, 83 S.Ct. at 1257.

In an unusual article arguing the legal merits of a pending action—the government civil antitrust suit against the principal defendant here (*United States v. American Telephone & Telegraph Co.,* 427 F.Supp. 57, D.D.C.)—the author distilled from the case law the following five criteria for determining whether antitrust immunity should be implied:

> "(1) the conduct challenged in the antitrust complaint, as well as rates, entry, and investment in the market, should be continually subject to the supervisory authority of the regulatory agency; (2) the agency should have the power to grant the relief requested by the antitrust plaintiff; (3) the benefits of competition should enter into the agency's public interest calculation; (4) agency expertise should be particularly useful in deciding issues in the antitrust suit; and (5) the antitrust suit should involve important regulatory policy questions." Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity,* 85 Yale L.J. 254, 258 (1975).

The author added:

> "Any claim of immunity which can meet all of these criteria should certainly succeed."

Despite the author's conclusion that all five of the criteria are satisfied in the government's case against AT&T, as discussed more fully hereinafter, two judges have successively ruled in that case that there was no implied immunity for the activities of AT&T.

Legislative History

Because the touchstone of implied immunity is congressional intent, any discussion of implied immunity in the telephone

industry must begin with a consideration of the content and legislative history of the Federal Communications Act.

The history of federal regulation of interstate communications carriers began with the Mann-Elkins Act of 1910, Pub.L. No. 218, 36 Stat. 539 which amended the Interstate Commerce Act to bring communications carriers under the jurisdiction of the Interstate Commerce Commission ("ICC"), 36 Stat. at 544, and established a mechanism for their regulation. A decade later, recognizing the desirability of unification of telephone networks and elimination of duplicative facilities, Congress, in the Willis-Graham Act of 1921, Pub.L. No. 15, 42 Stat. 27, empowered the ICC to grant antitrust exemption to mergers or acquisitions of local telephone companies which it found to be in the public interest.

In 1934, the regulatory apparatus was drastically revised by the Federal Communications Act, 47 U.S.C. §§ 151 *et seq.* ("the 1934 Act"), which created a separate agency, the FCC, with authority to regulate the interstate telephone, telegraph and radio communications industries. Congress expressly recognized that, by a series of mergers and consolidations, and by the creation of holding companies, AT&T had achieved a monopoly position in interstate telephone toll and private line services. H.Rep.No. 1273, Pt. III, No. 1, 73d Cong., 2d Sess. 856–60 (1934); S.Rep.No.781, 73d Cong., 2d Sess. at 2 (1934). Although Congress expressed the belief that the ICC should have scrutinized these annexations more carefully for possible abuses, H.Rep.No.1273, *supra* at 930-32, it reaffirmed the ICC's authority to grant antitrust exemptions for mergers in the public interest, 47 U.S.C. § 221, while reinforcing the ICC's power to insure the provision of efficient service at reasonable and non-discriminatory rates. 47 U.S.C. § 201; see S.Rep.No.781, 73d Cong., 2d Sess., 1–5 (1934).

The 1934 Act gives the FCC broad regulatory powers over telephone carriers, leaving to the FCC itself the responsibility for

determining the scope of these powers. S.Rep.No.781, 73d Cong., 2d Sess. 1-2 (1934). Among the powers central to its mission are the control over the construction of new telephone lines and facilities and the discontinuance of service over existing facilities, such entry and exit requiring an FCC certificate of public convenience and necessity. 47 U.S.C. § 214(a), (b). Upon allowing entry of a new carrier, the Commission may order interconnection of its lines with those of existing carriers. 47 U.S.C. § 201(a).

The 1934 Act declares illegal any unjust, unreasonable, discriminatory or preferential charge or practice. 47 U.S.C. §§ 201(b), 202(a). At least ninety days before implementing any new charge or practice, the carrier must file with the Commission and publish generally a tariff setting forth the proposed charge or practice. 47 U.S.C. § 203 (1978 Supp.). No company may function as a communications carrier unless such tariffs have been filed, 47 U.S.C. § 203(c), and the carrier must not deviate from the tariff until it is modified as provided by law. 47 U.S.C. § 203(b), (c).

The Commission may conduct hearings to determine the reasonableness of the charge or practice and may suspend its effective date for a maximum of five months. 47 U.S.C. § 204(a) (Supp.1978). If it determines that the charge or practice is unreasonable, the Commission may promulgate a substitute which it deems just and reasonable. 47 U.S.C. § 205(a). It may enforce its orders by injunction and by a fine of $1,000 for each day of violation. 47 U.S.C. §§ 205(a), (b). And an injured party may obtain damages for unreasonable discrimination in a proceeding before the Commission or in an action in a district court. 47 U.S.C. § 207.

In aid of its determination of the reasonableness of rates and charges, the Commission regularly evaluates the property of the carrier, 47 U.S.C. §§ 213(a), (c), and is empowered to require the filing of annual reports, and to prescribe accounting practices and allowable depreciation charges. 47 U.S.C. §§ 219, 220.

In the 1934 Act, there is no express direction that the FCC, in determining the reasonableness of rates or practices, should take into account antitrust considerations. However, the power to enforce certain sections of the Clayton Act is conferred on the FCC by Section 11 of that Act, 15 U.S.C. § 21. That section specifically provides that no judgment of the FCC "shall in anywise relieve or absolve any person from any liability under the antitrust laws." 15 U.S.C. § 21(e). Moreover, Section 414 of the 1934 Act negates any inference that the federal regulatory scheme was intended to supplant the antitrust laws:

> "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414.

Administrative History

A major portion of Magistrate Sinclair's Recommended Decision (pages 32 to 166) is devoted to an exhaustive description of the elaborate system of regulations and rules which the FCC has promulgated for the purpose of regulating the telephone industry. From even a cursory review of that material, it is obvious that the FCC has both the statutory authority and the regulatory framework for controlling the operations of AT&T so as to prevent many of the anticompetitive abuses alleged in the complaint, particularly those relating to rates and interconnection practices.

In actual operation, however, the regulatory ideal of the 1934 Act is far from realization. The volume of tariff filings is simply far too great to permit meaningful review of all of them by the Commission.

During the 12-month period from September 1974 through August 1975, the Commission received 1,371 tariff filings totalling 11,491 pages, and was able to investigate only a small percentage of them. The Commission itself has therefore stated that

the tariffs "generally proceed from the carrier's independent judgment." Memorandum of the FCC, filed December 30, 1975, as cited in *United States v. AT&T*, 461 F.Supp. 1314, 1326–27 (D.D.C.1978).

The laxity and lag in the FCC's control over AT&T's tariff practices is particularly evident in the history of the equipment interconnection restrictions challenged here.

For many years, AT&T's tariffs on file with the FCC flatly prohibited subscribers from connecting to the Bell System any apparatus not obtained from one of the Bell companies. In 1956, this restriction was finally invalidated not by the FCC but by the Court of Appeals for the District of Columbia in an action brought by the manufacturer of a mechanical shield adapted to be clipped onto a telephone mouthpiece to provide privacy and reduce noise pickup. *Hush-a-Phone Corp. v. United States*, 99 U.S.App.D.C. 190, 193, 238 F.2d 266, 269 (D.C.Cir.1956), *rev'g* 20 F.C.C. 391 (1955), *on remand*, 22 F.C.C. 112 (1957). The court ruled the restriction unreasonable under Section 201(b) of the 1934 Act as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental."

Disregarding the broad language of the *Hush-a-Phone* ruling and construing it in the narrowest sense as relating only to mechanical attachments, AT&T filed a new tariff which prohibited "direct electrical connection" of any type of device with the telephone lines.

In 1965, an action was brought in the Northern District of Texas by the manufacturer of a device for connection of a base radio station to the telephone lines so that users of two-way mobile radios could communicate through the telephone system, charging that the revised tariff violated the antitrust laws. The court referred the controversy to the FCC for determination in the first instance under the principle of primary jurisdiction.

Carter v. American Telephone & Telegraph Co., 250 F.Supp. 188 (N.D.Tex.), *aff'd*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967). Thereupon, eleven years after filing of the tariff and only after being prompted by the court reference, the FCC began its first investigation of the legality of the restriction. Once the Commission was prodded into action, however, it took little time to determine that the restriction was unreasonable within the contemplation of Section 201(b) of the Act, and to direct AT&T to file a new tariff permitting the connection of equipment obtained from other sources, where such connection would not adversely affect the performance of the telephone system. *In re Use of the Carterfone Device*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968). Although the Commission recognized that the integrity of the network was a legitimate concern, it expressly rejected AT&T's contention that such integrity required that only Bell-supplied equipment be electrically connected to the system. It also declined to limit the scope of its ruling to the Carterfone device, because allowing the AT&T tariff to continue in effect with respect to other electrically connected equipment would constitute "a clearly improper burden upon the manufacturers and users of other devices," 13 F.C.C. at 425. It stated that AT&T could prohibit the interconnection of only those devices which actually cause harm to the system and could set up reasonable standards to exclude harmful equipment.

Again disregarding the broad implications of the Commission action, AT&T filed new tariffs permitting the electrical interconnection of customer-supplied equipment but imposed the requirement that such equipment be connected to the telephone lines only through "protective connecting arrangements" supplied and maintained by AT&T. Objections were filed to these *"post-Carterfone"* tariffs by a number of suppliers of competitive equipment and by the United States; however, the Commission ruled that because the new tariffs did not contravene the express direc-

tives of *Carterfone* (since that case involved the interconnection of ancillary equipment rather than "replacement of [a] part of the telephone system"), it would permit the tariffs to become effective pending commission review, emphasizing that "in doing so, we are not giving any specific approval to the revised tariffs." The Commission simultaneously ordered its staff to commence immediately a technical investigation to consider what further changes were necessary in light of a number of unresolved questions. *AT&T "Foreign Attachment" Tariff Revisions,* 15 F.C.C.2d 605, 610-11 (1968), *reconsideration denied,* 18 F.C.C.2d 871 (1969).

This investigation covered the next four years and resulted in a report concluding that the objective of protecting the integrity of the system would be served by permitting the interconnection of customer-supplied equipment meeting technical standards to be specified. The FCC accepted the report and initiated a Notice of Inquiry and Proposed Rule Making. *Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS,* 13 F.C.C.2d 539 (1972). Three years later, on November 7, 1975, the Commission promulgated standards for the registration of equipment that would "provide the necessary minimal protection against network harm." *Proposals for New or Revised Classes of Interstate and Foreign MTS and WATS,* First Report and Order, 56 F.C.C.2d 593, 599 (1975), *on reconsideration,* 57 F.C.C.2d 1216, 58 F.C.C.2d 716, 59 F.C.C.2d 83 (1976). To forestall further evasion of the spirit of its mandate, the FCC ordered AT&T not to require the interposition of an interface device between registered customer-supplied equipment and the telephone system or to "impose other conditions contrary to the *Carterfone* policy without prior approval of the Commission." 56 F.C.C.2d at 599.

This registration system has been in effect since 1975.

Discussion

Since the parties do not contend that the Federal Communications Act confers express immunity from the antitrust laws to

telephone carriers regulated by the FCC, this case must turn on the applicability of the two types of implied immunity described above: (1) immunity implied because the regulatory scheme established by Congress is so pervasive as to impliedly repeal the operation of the antitrust laws; or (2) immunity implied because the FCC, in accordance with its regulatory mandate, has ruled specifically as to interconnection of customer-supplied equipment in a way which conflicts with the application of antitrust principles to AT&T's filings for the years in question.

Prior Decisions on Interconnection Restrictions

The precise issue of implied immunity in connection with AT&T's filing of tariffs requiring AT&T-supplied interface equipment has been addressed recently in several highly persuasive opinions, including *Essential Communications Systems, Inc. v. AT&T, supra* (3d Cir. 1979); *United States v. AT&T*, 461 F.Supp. 1314 (D.D.C.1978, Greene, J.); and *United States v. AT&T*, 427 F.Supp. 57 (D.D.C.1976, Waddy, J.), *petition for cert. denied*, No. 77-1009 (D.C. Cir., filed May 26, 1977), *cert. denied*, 429 U.S. 1071, 97 S.Ct. 824, 50 L.Ed.2d 799 (1977).

Judge Greene's opinion in *United States v. AT&T* and Judge Waddy's earlier opinion in the same case consider the question of antitrust immunity in the context of a broad government challenge to AT&T's conduct of the telephone business, including AT&T's resistance to the entry of other, specialized carriers into the telecommunications service market, as well as AT&T's efforts to reduce or eliminate competition in the provision of ancillary telephone equipment. In that broad context, Judge Greene held (1) that the wording of the Federal Communications Act, the "relatively weak" regulatory power of the FCC to supervise telephone tariffs, and the practical inability of the FCC to scrutinize all the tariffs submitted to it indicated that, in the areas described, FCC regulation was not "pervasive" within the meaning of *Gordon, supra*, or *Otter Tail, supra*, see 461 F.Supp. at 1326;

and (2) that the FCC's failure specifically to approve the tariffs involved, and the Court's finding that the business practices contained in the tariffs were included as a result of AT&T's business judgment, rather than regulatory coercion or approval, indicated that no specific conflict existed between the FCC's exercise of its regulatory authority and the application of antitrust scrutiny to AT&T's alleged anti-competitive actions, including its interface device requirement and its predatory marketing practices. Judge Greene stated:

> "There is absolutly nothing to suggest that Congress expected the Commission to require or approve, or that the Commission did require or approve any of those practices. These activities not only violate the antitrust laws but they are also inconsistent with the very purposes of the regulation, or at the very least they are not required or encouraged either by the regulatory theory or by regulatory action." 461 F.Supp. at 1328.

Judge Waddy similarly found that no broad implied repeal of the antitrust laws covered AT&T's alleged activities in the government suit. 427 F.Supp. at 61.

In *Essential, supra,* a case specifically challenging the AT&T interface equipment requirement, the Court of Appeals for the Third Circuit, after tracing the history of the 1934 Act and of AT&T's tariff practices thereunder, found that AT&T's filing of and adherence to its tariff under § 205 was not immune to antitrust attack by *suppliers* of equipment (since any FCC regulatory approval under § 205 would be for the benefit of *customers* under the nondiscrimination goal of the statute, so that the "filed tariff" doctrine of *Keogh, supra,* would bar damages recovery by those customers only). *Id.* at 1123-1124. Moreover, the Third Circuit found that no conflict existed between the FCC's actions and application of the antitrust laws because

> "[t]he FCC never approved the 1968-1975 tariff. Instead of holding a hearing immediately after the filing as permitted

> by the Act, the FCC told AT&T to file a tariff subject to later approval or disapproval in accordance with certain independent studies commissioned by the agency. In effect, the FCC suspended its judgment pending further study. We do not feel that this course of conduct rises to the level of agency approval that might require implied immunity. Postponement of action by the agency cannot be construed as approval requiring a court to refrain from enforcing the antitrust laws, especially where, as here, the agency ultimately declared defendant's interim conduct improper. Thus we find no basis for the conclusion that the enforcement of section 4 of the Clayton Act in the form of money damages would present a conflict with the policies of the 1934 Act." At 1124.

Significantly, this decision reversed the judgment of the District Court dismissing the complaint on the ground of implied immunity, *Essential Communications Systems, Inc. v. AT&T*, 446 F.Supp. 1090 (D.N.J.1978), a decision heavily relied upon by Magistrate Sinclair in his Recommended Decision.

In a number of other recent decisions, the Courts have likewise found no implied immunity in connection with AT&T's interface device requirement. *Sound, Inc. v. AT&T*, Civ.No. 76-186-2 (S.D.Iowa, September 27, 1979); *Jarvis, Inc. v. AT&T*, 487 F.Supp. 120 (D.D.C.1978, Robinson, J.); *Interconnect Planning Corp. v. AT&T*, 465 F.Supp. 811 (S.D.N.Y.1978); *Northeastern Telephone Co. v. AT&T*, 1979-1 Trade Cases 77,171 (D.Conn.1978).

In addition to all these cases involving the interface device requirement, the courts in three other cases have considered the question of implied antitrust immunity in the closely similar context of AT&T's refusal to interconnect with other communications carriers, and in all three have ruled that there was no implied immunity. *MCI Communications Corp. v. AT&T*, 462 F.Supp. 1072 (N.D.Ill.1978) (interconnection with microwave transmission link between Chicago and St. Louis); *Woodlands Telecommunications Corp. v. AT&T*, 447 F.Supp. 1261

(S.D.Tex.1978) (interconnection with local telephone system in new community development near Houston); *Southern Pacific Communications Co. v. AT&T*, civil action 78-0545 (D.D.C. July 2, 1979) (interconnection with intercity business telecommunications system). The opinions in these three carrier-interconnection cases, and particularly that of Judge Grady in MCI, are also highly persuasive.

In *MCI*, Judge Grady, after a detailed analysis of the court decisions finding implied antitrust immunity in other administrative settings, and a thorough review of the legislative and administrative history of the 1934 Act, concluded that the FCC lacked the ability to grant relief for the types of anticompetitive activity allegedly engaged in by AT&T in that case (and here).

> "Unlike the statute analyzed in *Pan Am*, the Federal Communications Act does not have a section authorizing the FCC to grant relief from the variegated conduct included within the concept of 'unfair competition.' " *Id.* at 1086.
>
> "* * * Throughout the hearings, the Committee members assumed that the Sherman Act and the state antitrust laws would continue to apply to abuses arising from the existing, unaffected competition between telephone companies.
>
> [citing Hearings on S.1313 before the Joint Committee on Interstate Commerce, 67th Cong., 1st Sess. 17 at 26-27].
>
> "Therefore, nothing in the statute itself or its legislative history leads to the conclusion that the FCC has exclusive jurisdiction to remedy acts of unfair competition such as customer interference, false advertising, or trade disparagement.
>
> "Equally important, FCC proceedings do not provide the relief which MCI seeks. In its complaint, MCI prays for treble the damages its business sustained by reason of AT&T's exclusionary practices and for an injunction against AT&T's commission of future predatory acts." *Id.* at 1087.
>
> "* * * we must conclude that plaintiff's remedy for the acts of unfair competition alleged in the complaint is not

adequate because Sections 206–209 do not provide for treble damages, do not compensate competitive injury, and only provide for piecemeal consideration of allegedly predatory acts." *Id.* at 1088.

There are two decisions reaching the contrary conclusion that there is implied immunity in connection with AT&T's interface-device requirement, both by the same district court for the Central District of California: *Phonotele, Inc. v. AT&T,* 435 F.Supp. 207 (C.D.Calif.1977, Gray, J.); *Monitor Business Machines, Inc. v. AT&T,* 1978–1 Trade Cases 74,444 (C.D.Calif.1978, Williams, J.).

The force of these two decisions is somewhat weakened by their reliance on an earlier decision of the same court in *Dasa Corp. v. General Telephone Co. of California,* 1977–7 Trade Cases 72,536 (C.D.Calif.1977, Lydick, J.). In *Dasa,* the court considered the issue of implied antitrust immunity in the context of an alleged conspiracy between General Telephone Co. of California and the supplier to it of a "divert-a-call" device which automatically switches an incoming call from one telephone number to another. In a brief, 1½-page opinion, containing little by way of analysis, the court ruled that there was implied immunity, expressly basing that decision upon its conclusion that the ruling of the Fourth Circuit in *North Carolina Utilities Commission v. FCC,* 537 F.2d 787 (4th Cir. 1976), *cert. denied,* 429 U.S. 1027, 97 S.Ct. 651, 50 L.Ed.2d 631 (1976), was "controlling." That conclusion is difficult to understand. All that the *North Carolina* decision ruled was that the FCC had "primary authority" to order the interconnection of customer-supplied terminal equipment with the national telephone network, despite tariffs filed with and approved by State regulatory agencies prohibiting such interconnection with "intrastate" facilities. The Court did not rule that the FCC's authority to disapprove tariffs immunized from antitrust attack all activities associated with their filing. Indeed, the issue of antitrust immunity was neither involved nor discussed.

Phonotele, supra, was the only one of the opinions finding implied immunity which contained any substantial analysis of the factors giving rise to the implication of immunity. Judge Gray did not merely rely on Judge Lydick's decision in *Dasa,* but also found that four of the five factors listed in the Yale Law Journal note cited hereinabove were present: that the activities charged as antitrust violations involve the "precise ingredients" of the FCC's regulatory authority; that the FCC has authority to grant the relief sought there (an injunction and damages); that competition is a component of the "public interest" standard which guides the FCC's regulatory decision; and that the FCC has considerable expertise in the field. However, Judge Gray did not discuss, nor apparently consider, how the regulatory scheme, so fine in concept, had actually worked in practice.

Monitor, supra, was another very brief opinion, less than 2 pages in length, containing scant analysis but relying principally on the prior decisions of Judges Lydick and Gray in *Dasa* and *Phonotele.*

The weight of authority in cases involving the issue of antitrust immunity in connection with the filing of restrictive tariffs with the FCC thus overwhelmingly favors the conclusion that no such immunity exists.

Other Decisions on Implied Immunity

The Recommended Decision, and the defendants in supporting it, rely heavily upon the Supreme Court decisions finding implied immunity in the areas of airlines and securities regulation. These decisions were considered at length in the aforementioned cases involving communications regulation and found not to be controlling in the latter environment, because of differences in the statutory schemes and in the actual degree of administrative oversight.

In *Pan Am, supra,* the government charged that Pan Am had violated the antitrust laws by effectively allocating territories between itself and its subsidiary, Panagra, for example, by preventing Panagra from filing with the Civil Aeronautics Board ("CAB") a petition for a route extension from the Canal Zone to the United States. The Supreme Court found that Section 411 of the Civil Aeronautics Act of 1938, 49 U.S.C. § 1381, granted the CAB express authority to investigate complaints of unfair methods of competition and, employing a "public interest" standard which expressly required the CAB to consider the effects on competition, to issue cease and desist orders. The Court therefore concluded that the 1938 Act gave the CAB power to grant the only relief sought—divestiture of Panagra—and that antitrust immunity should therefore be implied:

> "* * * where the problem lies within the purview of the Board, as do questions of divisions of territories, the allocation of routes, and the affiliation of common carriers with air carriers, Congress must have intended to give it authority that was ample to deal with the evil at hand." 371 U.S. at 312, 83 S.Ct. at 486.

The ruling was expressly confined to the specific abuses charged in that case and was based on the CAB's exclusive jurisdiction to remedy them:

> "We think the narrow questions presented by this complaint have been entrusted to the Board and that the complaint should have been dismissed." *Id.* at 313, 83 S.Ct. at 486.

In *Hughes Tool, supra,* TWA charged that Hughes Tool's control over TWA's acquisition and financing of aircraft, through Hughes Tool's ownership of 45% of TWA's common stock, violated the antitrust laws. Hughes Tool moved for dismissal on the ground that the CAB had specifically approved its acquisition of the stock, so that antitrust immunity should be implied under the principle of *Pan Am.* Again the Court made an expressly limited ruling:

> "* * * [T]he authority of the Board to grant the power to 'control' and to investigate and alter the manner in which

that 'control' is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, pre-empts the antitrust field. 409 U.S. at 385, 93 S.Ct. at 660.

* * *

"We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws.

'While the Board is empowered to deal with numerous aspects of what are normally thought to be antitrust problems, those expressly entrusted to it encompass only a small fraction of the total.' 371 U.S. at 305 [83 S.Ct. at 482.]" *Id.* at 387, 93 S.Ct. at 661.

In his dissenting opinion in *NASD*, Justice White, joined by three other justices, again emphasized the limited applicability of *Hughes Tool*, stating that it "involved acts and transactions expressly immunized from antitrust scrutiny." 422 U.S. at 737, 95 S.Ct. at 2451.

In *Gordon, supra,* a class of small investors sued the New York Stock Exchange ("the Exchange") and two of its member firms for alleged violation of the Sherman Act by the system of fixed commission rates established by the Exchange for transactions of less than $500,000. The Supreme Court ruled that a provision of the Securities Exchange Act of 1934 permitting the Securities Exchange Commission ("SEC") to approve or disapprove commission rates conferred implied antitrust immunity. The Court found a demonstrable Congressional intent to leave the obviously anticompetitive practice of commission-fixing to Exchange self-regulation, subject to SEC approval, 422 U.S. at 667, 95 S.Ct. at 2604, and further that, in actual practice, the SEC had so closely supervised the Exchange's commission rate practices as to have effectively sanctioned them. *Id.* at 689, 95 S.Ct. at 2605.

Two separate concurring opinions emphasized the narrow bounds of the Court's ruling. Justice Douglas wrote:

"The mere existence of a statutory power of review by the SEC over fixed commission rates cannot justify immunizing

> those rates from antitrust challenges. * * *. Only if the SEC is actively and aggressively exercising its power of review can we be sure that fixed commission rates are being monitored in the manner which Congress intended." *Id.* at 691–92, 95 S.Ct. at 2616.

And Justice Stewart, joined by Justice Brennan, added:

> "The Court has never held, and does not hold today, that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants. An implied repeal of the antitrust laws may be found only if there exists a 'plain repugnancy between the antitrust and regulatory provisions,' *United States v. Philadelphia Nat. Bank,* 374 U.S. 321 [83 S.Ct. 1715, 10 L.Ed.2d 915]." *Id.* at 692, 95 S.Ct. at 2616.

In the present case, by contrast, there was no evident congressional design that AT&T would act as a self-regulator. Moreover, as previously discussed, the FCC's supervision over AT&T's activities has been far from tight. Finally, the only time the FCC ruled on the interface device requirement challenged here, it found it to be unreasonable and illegal; the SEC had for many years expressly approved the fixing of commission rates and had strongly resisted opening them up to competition.

NASD, supra, was an antitrust action by the government against the National Association of Securities Dealers ("NASD") and certain of its member firms, based on their agreement limiting sale of mutual fund shares except by issuers, underwriters and contract dealers, at the offering price described in the prospectus, thus preventing the development of a secondary dealer market.

The defendants moved for dismissal on the ground that Sections 22(d) and (f) of the Investment Company Act of 1940, 15 U.S.C. § 80a–22(d) and (f), either required or authorized such restrictions and that the Maloney Amendment to the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*–3, provides a system of self-regulation by the registered voluntary associations, such as the NASD.

In a decision filed the same day as *Gordon*, a five-to-four majority of the Court found that:

"The Commission-sponsored provision authorized the SEC to promulgate rules, regulations and orders prohibiting restrictions on the transferability or negotiability of mutual-fund shares, S.3580, § 22(d)(2), 76th Cong., 3d Sess. (1940). Commission testimony indicates that it considered this authority necessary to allow regulatory control of industry measures designed to deal with the disruptive effects of 'bootleg market' trading and with other detrimental trading practices identified in the Investment Trust Study." 422 U.S. at 722, 95 S.Ct. at 2444.

"* * * the statute reflects a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices.

"The Commission repeatedly has recognized the role of private agreements in the control of trading practices in the mutual-fund industry." 422 U.S. at 727, 95 S.Ct. at 2446.

Despite the obvious anticompetitive effect of these agreements, the Court recognized that

"* * * Congress has made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual fund industry, and has vested in the SEC final authority to determine whether and to what extent they should be tolerated 'in the interest of the holders of all outstanding securities' of mutual funds. 15 U.S.C. § 80a-22(f)." *Id.* at 729, 95 S.Ct. at 2447.

The Court emphasized that the SEC had discharged its statutory responsibility by continually monitoring the challenged practices of the NASD and "repeatedly has recognized the role of private agreements in the control of trading practices in the mutual fund industry." *Id.* at 727, 95 S.Ct. at 2447. More specifically, the Court noted that the SEC had reviewed the particular

NASD rule in question, and had expressly recognized its power to control such restrictions under Section 22(f). *National Association of Securities Dealers, Inc.*, 9 S.E.C. 38, 44–45 and n.10 (1944). The Court added:

> "* * * this contemporaneous interpretation by the responsible agency is entitled to considerable weight." *Id.* at 725, 95 S.Ct. at 2445.

In that connection, it was doubtless of some significance in *NASD* that the SEC filed an *amicus curiae* brief arguing that the complaint should be dismissed on the ground of implied immunity.

In the situation at bar, by contrast, the FCC filed in the government antitrust case, and the government filed in *Essential, amicus curiae* briefs contending that the FCC's regulation of the activities of AT&T was not such as to create implied antitrust immunity with respect to the tariffs here in question.

Summary

[3] There is nothing in the 1934 Act or in its legislative history which suggests that Congress intended that the regulation of communications carriers by the FCC would exempt from the antiturst laws all of the activities of such carriers relating to the regulated business. Quite the contrary, the Act specifically provides that nothing contained in it "shall in any way abridge or alter" statutory or common law remedies. 47 U.S.C. § 414 (1976). And the fact that the Act contains a specific provision granting antitrust exemption for mergers approved by the FCC, 47 U.S.C. § 221(a) (1970), clearly indicates that Congress contemplated no general exemption.

Moreover, the FCC itself has construed the Act as leaving undisturbed the jurisdiction of the courts over antitrust controversies arising out of activities which it has neither required nor approved. The FCC has expressly recognized that its control over

the activities of communications carriers, unlike that exercised by the CAB and the SEC over the airlines and the securities markets, leaves the carriers a considerable degree of control over their own operations.

AT&T formulates its own tariffs, based on its independent business judgment. From the history of the tariffs involved here, it would appear at least possible for a jury to infer that AT&T has not always been motivated exclusively by an altruistic concern for the public interest, and even that some of its actions have instead been influenced by an obsessive abhorrence of competition.

The FCC's admitted inability to review most of the tariffs filed with it, and the long delays experienced in determining the reasonableness of those it does examine, have created an obviously tempting opportunity for AT&T to obliterate competition for long periods simply by filing tariffs containing restrictions on competition even though they are foredoomed ultimately to be struck down. For example, by the time the interface device requirement was finally supplanted by the registration system in 1975, Litton's BTS subsidiary had failed and was on its way out of business.

The interface device requirement would seem difficult to justify as necessary to insure the integrity of the telephone network. If AT&T could provide telephone terminal equipment capable of being connected directly to the telephone lines without an interface device and without injury to the system, there is no apparent reason why other technically qualified manufacturers, including Litton, could not do so as well. It would seem to have been obvious from the outset that the system could be adequately protected by establishing specifications as to impedance loading and other electrical effects of interconnection with the terminal equipment, which is just what the FCC ultimately determined.

The complaint charges, in effect, that AT&T (knowing that the tariffs would probably remain in effect for a number of years

at least) included the interface device requirement in bad faith, then deliberately delayed the FCC's consideration of the reasonableness of the restriction and supplied false and misleading information to the FCC in connection therewith and, during the seven years the restriction remained in effect before the FCC finally declared it unreasonable, intentionally designed the interface equipment so as to degrade the audio quality of the signals, charged exorbitant prices for the interface equipment and deliberately delayed its production, installation and servicing, as well as falsely disparaging competitive terminal equipment which was in fact superior to the Bell equipment, and bribing the officials of state agencies to deny fair access and hearing to AT&T's competitors.

Whether plaintiff can prove these allegations remains to be seen. But, for purposes of testing the legal sufficiency of the complaint as against the challenge of implied immunity, the allegations must be accepted as true. *California Motor Transport, supra* at 515–16, 92 S.Ct. at 614.

What the complaint charges, in effect, is a calculated subversion of the regulatory scheme. The system of administrative supervision is not undercut but is complemented and reinforced by affording judicial relief for cynical evasion or corruption of that system for unfair competitive advantage. As Judge Grady stated in *MCI*, "even the most pervasive scheme of regulation cannot immunize someone from anticompetitive sham activity which seeks to abuse the regulatory process itself." 462 F.Supp. at 1098. See also *United States v. AT&T, supra,* 461 F.Supp. at 1328–29 (citing *Georgia v. Pennsylvania R.R., supra*).

There is no "plain repugnancy" between the FCC's authority to approve AT&T tariffs and the court's authority to provide a remedy to competitors who are injured by tariffs which are filed in bad faith and are ultimately disapproved, as well as by other acts of unfair competition not within the FCC's traditional area of

responsibility. Repeal of the antitrust laws is not "necessary to make the [regulatory scheme] work."

[4] The Court concludes that no implied immunity from the antitrust laws exists for the activities of AT&T alleged in the complaint.

NOERR-PENNINGTON IMMUNITY

[5] Defendants have also urged that such of their allegedly improper activities as were intended to influence governmental action are protected by the First Amendment under the doctrine of the *Noerr* and *Pennington* cases, *supra*. This contention need not occupy us long.

In *Noerr*, an association of trucking companies charged that a group of railroads, aided by a public relations firm, had conducted a massive campaign of deceptive publicity designed to foster legislation harmful to the truckers and to impair their relations with their customers. The Supreme Court after a review of the entire record, concluded that the publicity campaign was motivated by the railroads' efforts to influence legislation and that the injury sustained by the truckers was merely "incidental." The Court ruled that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws." 365 U.S. at 135, 81 S.Ct. at 528. The Court explained:

> "In a representative democracy such as this, these [Legislative and Executive] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Id.* at 137, 81 S.Ct. at 529.

* * *

"The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Id.* at 138, 81 S.Ct. at 530.

However, the Court cautioned:

"[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144, 81 S.Ct. at 533.

In *Pennington,* a small coal company alleged that the United Mine Workers' Union and certain large coal companies had conspired to influence the Secretary of Labor to prescribe higher minimum wages and thereby squeeze it and other small operators out of business. The Supreme Court ruled:

"*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. * * Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670, 85 S.Ct. at 1593.

The *Noerr* opinion's suggestion that no immunity would exist for "sham" efforts to influence governmental action which were actually intended to injure competitors found practical application in *California Motor Transport, supra.* In that case, one group of highway carriers sued another, alleging that the defendants had conspired to put the plaintiffs out of business by instituting groundless state and federal proceedings to delay and defeat plaintiffs' applications to acquire and transfer operating rights, thereby depriving plaintiffs of free and unlimited access to the regulatory agencies. The Supreme Court ruled that the

District Court erred in dismissing the complaint for failure to state a cause of action, remarking:

> "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute * * *. 404 U.S. at 514, 92 S.Ct. at 613. "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' * * * which the legislature has the power to control. * * * If the end result is unlawful, it matters not that the means used in violation may be lawful." *Id.* at 515, 92 S.Ct. at 614.

Likewise, in *Woods Exploration & Production Co. v. Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972), the Fifth Circuit court ruled that the filing of false natural gas production forecasts for the purpose of influencing the Texas Railroad Commission to reduce plaintiffs' production allowances was an "abuse of the administrative process" which "does not justify antitrust immunity." 438 F.2d at 1298.

Magistrate Sinclair concluded, and this Court agrees, that the activities of defendants alleged in the complaint would, if proven, constitute such abuse of the administrative process as to come within the "sham" exception to the *Noerr-Pennington* doctrine. This doctrine, therefore, provides no basis upon which defendant's motion for summary judgment could be granted.

STATE ACTION

[6] Defendants further contend that the tariffs challenged here were filed at the direction of the FCC and the responsible state regulatory agencies and are therefore immune from antitrust attack under the "state action" doctrine enunciated in *Parker v. Brown, supra.* That contention likewise merits only brief discussion.

Parker v. Brown was an antitrust action seeking an injunction against enforcement of the provisions of the California Agricultural Prorate Act which restricted competition among raisin growers to prevent destructive price cutting. The Supreme Court ruled:

> "nothing in the language of the Sherman Act or in its history * * * suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. 317 U.S. at 350–51, 63 S.Ct. at 313.
>
> "* * * The state * * * as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 352, 63 S.Ct. at 314.

In *Jeffrey v. Southwestern Bell,* 518 F.2d 1129 (5th Cir. 1975), the "state action" doctrine was applied to exempt from antitrust attack the activities of Bell's Southwestern regional operating company in filing with the Dallas City Council tariffs setting rates for telephone services within the city. The court stated:

> "Regulation by a governmental body of the rates to be charged by a public utility are a classic example of the *Parker v. Brown* exemption." 518 F.2d at 1134.

However, the Supreme Court has repeatedly emphasized that the "state action" exemption extends only to actions which are not merely at the instance of the state government, but which are specifically compelled by it.

For example, in *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court considered "whether a minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar" violated the Sherman Act. 421 U.S. at 775, 95 S.Ct. at 2007. The defendants claimed "state action" immunity, contending that the Virginia State Bar was "a state agency by law." *Id.* at 790, 95 S.Ct. at 2014. The Court concluded:

> "It is not enough that * * * anticompetitive conduct is 'prompted' by state action; rather anticompetitive activities

must be compelled by direction of the State acting as a sovereign." *Id.* at 791, 95 S.Ct. at 2015.

To the same effect is the Court's earlier decision in *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 706–07, 82 S.Ct. 1404, 1414, 8 L.Ed.2d 777 (1962).

And in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court ruled that, even though the defendant utility was subjected to pervasive regulation by the Michigan Public Service Commission, which had specifically approved its tariff providing that the utility would replace for its customers free of charge their burned-out light bulbs, this practice was not immune from antitrust attack. The Court explained:

> "Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's." *Id.* at 594, 96 S.Ct. at 3119.

Likewise, in the present case, although the tariffs in question were filed at the direction of federal, state or local regulatory agencies, and could not be changed without agency approval, the idea of preventing the interconnection of customer-supplied terminal equipment without a Bell-supplied interface device originated with AT&T. Moreover, unlike the tariff in *Cantor*, the interface device requirement was never specifically approved and was ultimately found by the FCC to be unreasonable and illegal.

By no stretch of meaning can the interface-device requirement be deemed to have been "compelled" by the regulatory agencies, even though the filing of *some* tariff was. The "State Action" doctrine accordingly does not shield defendants' actions from the reach of the antitrust laws.

PRIMARY JURISDICTION

[7] The Court rejects Magistrate Sinclair's alternative recommendation, that this action should be stayed pending determination of the issues in the first instance by the FCC under the principle of primary jurisdiction.

In *United States v. R.C.A., supra,* the Court explained the rationale underlying the principle:

> "The doctrine originated with Mr. Justice (later Chief Justice) White in *Texas & Pacific R. Co.v. Abilene Coton Oil Co.,* 204 U.S. 426, [27 S.Ct. 350, 51 L.Ed. 553]. It was grounded on the necessity for administrative uniformity, and, in that particular case, for maintenance of uniform rates to all shippers. A second reason for the doctrine was suggested by Mr. Justice Brandeis in *Great Northern R. Co. v. Merchants Elevator Co.,* 259 U.S. 285, 291 [42 S.Ct. 477, 66 L.Ed. 943] where he pointed to the need for administrative skill 'commonly to be found only in a body of experts' in handling the 'intricate facts' of, in that case, the transportation industry." 358 U.S. at 346, 79 S.Ct. at 464 (footnote omitted).

The expressed basis for Magistrate Sinclair's recommendation that the principle be applied in this case is that the FCC has "special expertise, a vast compendium of knowledge" (p. 242) in the relevant areas, and "[i]n order to preserve the regulatory scheme, the agency should be given the opportunity to interpret its owns rules and regulations" (p. 244), thereby reducing the possibility of inconsistent results among the "welter" of cases presenting the same issues.

The Court concludes that this case is not a proper one for referral to the FCC for the reason that the FCC has already employed its expertise in deciding the principal issue with respect to which that expertise was needed: whether the interface device requirement was fair and reasonable.

The only other issues with respect to which the FCC's special expertise might be advantageous are (1) whether the data supplied to the FCC, in an attempt to justify the interface device requirement, were false and misleading; and (2) whether the Bell terminal equipment was predatorily underpriced.

However, neither of these issues is beyond the understanding of laymen. Moreover, there is no assurance that the FCC would choose to resolve the issues nor, if they did, any way of predicting how long it would take. Based on experience with the post-*Carterfone* tariffs, it appears unlikely that the FCC would reach a decision for several years at least. The present case has already been pending for over three and one-half years, during which time intensive trial preparations have been pursued so that the case is almost ready for trial. Any further substantial delay would disserve the interests of justice.

Insofar as concerns the possibility of conflicting results, defendants have achieved no apparent success in persuading any of the other courts to refer the issues to the FCC. It thus appears that, even if this Court should make such a reference, the possibility of inconsistent results will still exist.

Finally, there is one problem which is not addressed by any of the parties in their briefs, nor treated in any of the decisions they have cited: plaintiffs have demanded a jury trial of all the issues. If the FCC's findings are treated as preclusive, or even if they are admissible in evidence, it appears that substantial Seventh Amendment questions will be raised.

The Court concludes that, on balance, the advantages of referral to the FCC are outweighed by the disadvantages.

CONCLUSION

Defendants' motion is denied in its entirety, and defendants' request for certification of the question to the Court of Appeals under 28 U.S.C. § 1292(b) is also denied.

SO ORDERED.

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APPENDIX C

District Court's Opinion Denying Motion For A Judgment Notwithstanding The Verdict Or For A New Trial

LITTON SYSTEMS, INC., et al., Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants.

NEW YORK TELEPHONE COMPANY, et al., Counterclaimants,

v.

LITTON SYSTEMS, INC., et al., Counterdefendants.

LITTON SYSTEMS, INC., Plaintiff,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.

Nos. 76 Civ. 2512(WCC), 77 Civ. 3720(WCC).

United States District Court, S. D. New York.

Sept. 28, 1981.

Howrey & Simon, Washington, D. C., Peter E. Fleming, Jr., Curtis, Mallet-Prevost, Colt & Mosle, New York City, for plaintiffs-counterdefendants; William Simon, John W. Nields, Jr., Washington, D. C., of counsel.

Dewey, Ballantine, Bushby, Palmer & Wood, New York City, for defendants-counterclaimants; Leonard Joseph, Harvey Kurzweil, J. Paul McGrath, Peter H. Jacoby, New York City, of counsel.

OPINION AND ORDER

CONNER, District Judge:

Defendants have moved for judgment notwithstanding the jury verdict rendered June 29, 1981 and the Court has fully considered the extensive memoranda filed by the parties in support of and in opposition to the motion. Substantially all of the points now urged by defendants were raised and argued on the same grounds before and/or during the trial. Upon reconsideration, the Court reaffirms its previous rulings on each of these points. Even if some of the rulings were incorrect, it appears unlikely that they affected the jury's verdict. Because the Court's reasons for each of the challenged rulings were adequately, albeit generally informally, expressed, no further discussion appears warranted at this time.

The motion is denied.

SUPPLEMENTAL ORDER

Supplementing the Court's Order dated September 28, 1981, denying defendants' motion for judgment notwithstanding the jury verdict rendered June 29, 1981, the Court also denies, *nunc pro tunc,* defendants' alternative motion for a new trial.

SO ORDERED.

APPENDIX D

Order Of Court Of Appeals Denying Petition For Rehearing, With Suggestion For Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirty-first day of March, one thousand nine hundred and eighty-three.

LITTON SYSTEMS, INC., ET AL., Plaintiffs-Appellees, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., Defendants-Appellants.	Nos. 81-7598, 7766, 7776, 7778, 7856

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, American Telephone and Telegraph Co., et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

By /s/ Francis X. Gindhart

Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX E

Excerpts From The Trial Record

EXCERPTS FROM AT&T's COMMENTS IN DOCKET 19258 (BB2V 1128–1308)

COMMENTS OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY

American Telephone and Telegraph Company (AT&T) respectfully submits the following comments in response to the Commission's First Supplemental Notice of Inquiry and Rule Making herein.[1]

I. INTRODUCTION

Issues Presented

1. In this proceeding the Commission has requested "comments on certain proposals submitted recently to the Commission recommending the establishment of programs for technical standards and enforcement thereof that, if adopted, would expand the options available to customers" for the [1129] connection of customer-provided equipment or systems to the nationwide telephone network.[2]

2. Questions of fundamental importance to the future of telecommunications service to the public in this country are presented herein. The Commission stated when it initiated this docket, "[o]ur proceeding herein is concerned with . . . whether, and to what extent, there is a public need for us *to go beyond* what we ordered in *Carterfone* and permit customers to provide, in whole or in part, the aforementioned NCSU's and CA's. . . ."[3] (Empha-

[1] 40 F.C.C.2d 315 (1973). The date for filing comments, originally set for June 15, 1973, was extended by various orders to October 17, 1973. See Order of Chief, Common Carrier Bureau, No. 06261, released September 5, 1973, herein.

[2] 40 F.C.C.2d 315, para. 1.

[3] 35 F.C.C.2d 539 at 542 (1972). NCSU refers to Network Control Signaling Unit and CA refers to Connecting Arrangement.

sis supplied.) The issues stated by the Commission raise other far-reaching issues which can have a drastic impact on the public interest. These issues should be set out clearly and confronted directly. They are so basic to the particular certification proposals now before the Commission that those proposals cannot properly be considered without at the same time passing on these issues.

3. The issues raised relate not only to the feasibility of the certification proposals being considered by the Commission herein, but also relate to the interconnection of customer-provided terminal equipment generally. First, issues are presented relating to the regulatory authority of the state commissions as well as this Commission over interconnection [1130] generally, and, more particularly, over the certification questions presented herein. Second, issues are presented as to the impact of the interconnection of customer-provided terminal equipment and the potential impact of the adoption of the certification proposals upon the quality and cost of telephone service to the using public. In particular, an issue which must be addressed herein is the consequences in terms of the quality and cost of service of permitting non-common carriers to supply basic elements essential to the provision of communications services. Questions raised include the following:

(a) Is there a significant risk that the changes implied in the Commission's questions will adversely affect the quality and cost of the nation's telephone service?

(b) If such changes were permitted, who would then be responsible for the quality and cost of telephone service used by the public? Is it to be the regulated telephone companies? If so, what redefinition of their responsibilities is required? Is public understanding of that redefinition possible? If it is to be the regulatory commissions, how will they carry out such responsibility as to unregulated suppliers and users of equipment? Or will no one be responsible for quality of service in that area, thus leaving, in the future, the quality of service to chance?

(c) Will the elimination of the requirement for a telephone company-provided CA result in cheaper or better telephone service for the American public as a whole? Or will it benefit a few at the expense of many?

(d) What shift in revenue requirements may result from the changes implied in the Commission's two questions? And is such a shift in the public interest?

(e) If the evidence shows that the suggested changes will cause telephone service to cost more for most users and will cause service to be of lower quality, is the promotion of further competition in the terminal equipment area of such overriding public interest that lower quality and higher costs of telephone service should be imposed on the American public?

Third, the impact of interconnection and certification upon the innovative process in the telephone industry must be considered. Fourth, the technical, engineering, operational and administrative impact of the particular certification proposals must be evaluated. Fifth, the costs associated with these proposals must be determined.

Statement of Position

4. We believe that it is not in the public interest to permit customers the option of providing their own NCSUs or CAs or that "there is a public need . . . to go beyond" *Carterfone*. We believe that the people of this country have been well served—and will be best served—by the concept that has provided it with the most highly developed communications service in the world. That concept, known as the common carrier principle, requires a universal system designed and configured to operate as a single integrated entity, with end-to-end services available on equitable terms to all its users. Further we believe that these services are so affected with the public interest as to require that they be provided by common carriers subject to continuing public regulation.

5. We believe that there will be certain adverse consequences upon the quality and cost of telephone service from the impact of both the interconnection of customer-provided equipment and the adoption of these certification proposals. The public interest, construed, as it must be, as the widest availability of high quality communication at the lowest overall cost to all users, will inevitably be impaired by the duplication of facilities and the division of responsibility that will ensue from further interconnection in an industry where compatibility of components and precise coordination of process are crucial. Interconnection has had an adverse impact on the innovative process in the telephone industry and the impact of certification would be even more detrimental.

6. As to the particular certification proposals now before the Commission, we do not believe that they should be either adopted or implemented. Such proposals, and indeed any program of certification would, in our view, inevitably lead to the uncontrolled connection of customer-provided equipment to the telecommunications network. The ability to allocate responsibility for network performance would perforce be destroyed. Regulatory control and the quality of service would be diminished. These certification proposals are incomplete and inadequate. As structured, they are complex, cumbersome and impractical. In actual operation, the complex structure with its division and dispersal of responsibility which is necessarily inherent in any such program would cause a gradual deterioration in the effectiveness of any such program. Clearly, an ineffective program is not acceptable. Moreover, there are no apparent cost advantages to certification for the ultimate user of customer-provided equipment. The costs of protecting the network must be paid one way or the other. While certification diffuses the costs of network protection, it does not reduce them.

7. In the consideration of the issues herein, it must be kept in mind that regulation of terminal equipment and connection there-

to, or replacement thereof, has clearly been left to the state and local authorities. The Communications Act and its legislative history lead to that conclusion. Also, the present interstate and intrastate tariffs reflect that Congressional determination. The certification proposals being considered by the Commission herein are clearly matters of local concern. The Commission's authority over the matters at issue herein is limited and adoption by it on a preemptive basis of any of the certification proposals would be an unlawful encroachment upon state and local regulatory authority.

* * *

26. Telephone company control of—and concomitant responsibility for—all the facilities used in rendering service is most desirable. Connections of customer-provided terminal equipment, whereby equipment formerly provided by the telephone companies is replaced by such interconnections, has two major adverse consequences. First, to the extent the Commission adopts proposals, such as those before it in this proceeding, which permit replacement of equipment not controlled by the telephone companies, the quality and cost of service to all users will be adversely affected. As noted below, present interconnection policies and practices to some extent have already had this effect. Certainly, any loosening of these policies can only serve to exacerbate this situation. By its very operation, connection of customer-provided equipment as defined above will result in divided responsibility for the quality of service and operation of the network. The demonstrated ability to restore communications facilities in times of emergency and disaster will be affected. The telephone companies' ability to innovate will be impaired. Second, connection of customer-provided equipment will impact upon the prices and price structures for communications services described above. Such connections change those traditional relationships. The replacement of telephone company-provided terminal equipment by customer-provided terminal equipment will upset the balance

between interstate and intrastate services achieved under present jurisdictional separation formulas. Also, competition in this area will force price changes which will eliminate the public benefits derived from existing price structures.

27. Thus, we believe it is essential in evaluating the proposals now before it—and similar ones which would permit the provision of integral parts of the network by non-common carriers—that this Commission consider most carefully whether such high quality, low cost universally available basic service could be provided if responsibility for the provision and operation of the network were divided among a number of suppliers. In our view, replacement by customers of essential equipment now provided by the telephone companies would impair the "end-to-end" service concept and the benefits of that concept which have been achieved, and is therefore undesirable. The impact of a departure from this proven concept on the quality of service and the costs thereof cannot be ignored.

28. The *Carterfone*[4] case led to new approaches to the connection of customer-provided equipment to the network. We opposed that decision because of our concern for the adverse effects that interconnection of customer-provided equipment would have on the quality of service provided to the public. The post-*Carterfone* tariff filings represented our best efforts to open the network to the connection of customer-provided equipment consistent with certain network and employee protective requirements. However, experience since then has served only to reinforce our earlier views. Certainly, nothing in our experience would support a "need . . . to go beyond . . . *Carterfone* and permit customers to provide, in whole or in part . . . NCSU's and CA's . . ."[5]—one of the central issues to be considered herein. Indeed, problems have been experienced which indicate that interconnection in any form

[4]13 F.C.C.2d 420 (1969).

[5]35 F.C.C.2d 539 at 542 (1972).

tends to degrade the quality of service and to increase the costs of service to all users.

29. The tariff provisions relating to the connection of customer-provided equipment provide only minimal protection of network services and telephone personnel from certain harms caused by such connections. The vulnerability of the network to technical harms, and the ways in which customer-provided equipment cause harm to the network have been firmly established.[6] Likewise, the need for protection of the network from uncontrolled interconnection has been widely accepted. Indeed, the Commission's actions in establishing the various advisory committees and its directions to those committees[7] implicitly recognize the need for protection—at least from the harms as discussed by the NAS Panel.

30. The specific harms discussed by the NAS Panel are, however, only a limited aspect of the problem. As previously mentioned, overall quality of service is a vital area of concern. The performance and transmission characteristics of customer-provided equipment which replaces basic telephone company equipment is a matter of concern not only to the user of that equipment but also impact on the quality of service rendered to all users. End-to-end service, both its quality and cost, is not adequately protected by today's regulations permitting such connections, nor is it adequately protected in any of the proposals which have been submitted. The ability to restore service in time of natural disaster or for reasons of national defense is also affected.

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[6]"Report of a Technical Analysis of Common Carrier/User Interconnections" (the NAS Report) made by the Special Panel on Common Carrier Interconnection of the National Academy of Sciences' Computer Science and Engineering Board (the NAS Panel) which was released by the Commission with its Public Notice 51094, dated July 1, 1970.

[7]PBX Interconnection, Advisory Committee, 28 F.C.C.2d 403 (1971); Answering Devices, 33 F.C.C.2d 526 (1972).

31. It is often argued that the impact on the quality of service of the interconnection of customer-provided equipment is merely potential and not real or actual. This is simply not true. In fact, our experience is clearly to the contrary. For example, current studies indicate that intercity private line serving links equipped with at least one customer-provided terminal generated trouble reports at a rate at least 50 percent higher than did serving links equipped with telephone company-provided terminals only. The studies now in progress on message telephone lines are showing like results—the trouble report rate for lines equipped with customer-provided terminals is more than 25 percent higher than lines connected solely to telephone company-provided terminals. As we have previously reported to this Commission with respect to interstate voice grade private line data services, where the same minimum protection criteria apply as on the public switched telecommunications network, a sizable percentage (8.5 percent) of the customers utilizing their own data transmitting equipment were applying signal power in excess of the established network protective criteria, thereby degrading the service of other customers. The same survey showed, in the case of a particular type of connection or interface which is comparable to that encountered on public switched network services, that 18 percent of the customer-provided terminals violated the minimum network protection criteria by a substantial degree.

32. Complete and exhaustive statistics demonstrating all the harms from uncontrolled interconnection or the total impact on the quality of service might not be obtainable, given the nature of the problem studied. Certain effects simply are not measurable. How many wrong numbers[*] or how much crosstalk occurs from the use of customer-provided terminals can only be observed at the time of or during their occurrence. The difficulties in making such measurements are apparent. However, the data cited above

[*]The fact is that an increase of but one percent in ineffective calling attempts will add about $75 million to the capital costs of the network and about $27 million to the annual operating expenses.

are sufficiently consequential to suggest that interconnection has an adverse impact on the quality of service. Certainly, for the reasons set forth in these comments, further loosening of interconnection policies, such as customer options embodied in the certification proposals before the Commission in this proceeding, is not in the public interest and should not be adopted.

* * *

BELL'S PROPOSED INSTRUCTIONS

Defendants' Proposed Instruction No. 27A*

EXERCISES OF FIRST AMENDMENT RIGHTS ARE NOT VIOLATIONS OF SHERMAN ACT

Bell takes the position that a great many of the actions which Litton claims are violations of the Sherman Act are not prohibited or covered by that Act because they implicate the exercise by Bell of rights guaranteed them by the First Amendment to the Constitution of the United States.

Under the First Amendment, both persons and corporations have an absolute right to act together to petition the government for redress of grievances. Under the First Amendment, they also have the right to speak freely on matters of public concern, without fear of prior restraint or subsequent punishment.

The right to petition the Government for redress of grievances, either jointly or singly, covers all instances where persons or corporations genuinely seek to bring about the action of some branch of government, federal or state, in their favor. That right includes the right to go to court—either to bring a lawsuit, to defend a lawsuit, or to intervene in lawsuits brought by others. It further protects the right to go to administrative agencies, such as the Federal Communications Commission or state regulatory agencies, to seek the adoption of new regulations or the repeal of old ones, to institute proceedings, to defend proceedings, and to intervene in proceedings instituted by others. Finally, that right covers the filing of tariffs with the FCC and state commissions, since the filing of such tariffs is a necessary step to secure their approval by the government agency.

Many of these actions, if successful, might be harmful to a competitor, and they may have been undertaken with the intent to injure or harm a competitor. Nevertheless, the First Amend-

ment guarantees that Bell may participate in genuine efforts to influence the passage or enforcement of laws or government regulations, regardless of its intent in doing so, and without prior restraint or fear of subsequent punishment. The reason why such actions are not covered by the Sherman Act is that the Supreme Court held that Congress could not have intended to inhibit or restrict the exercise of constitutional rights in passing that Act. Therefore, as I shall instruct you later, you may not consider Bell's exercise of these constitutional rights to come within, or to constitute a violation of or evidence of a violation of, the Sherman Act.

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510–12, 515 (1972)); *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 136, 144 (1961); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers,* 542 F.2d 1076, 1082 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977); *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 227–28, 231 (7th Cir. 1975).

Defendants' Proposed Instruction No. 27C*

EFFORTS TO INFLUENCE PUBLIC OFFICIALS

As I told you a moment ago, a concerted and genuine effort to influence public officials does not violate the antitrust laws, regardless of intent or purpose. Therefore, with respect to the specific conduct challenged by Litton, you may not base a finding that Bell violated the antitrust laws upon such efforts to influence public officials, whether the officials are legislators, regulators, judges, or members of the executive branch.

Efforts to influence public officials do not violate the antitrust laws, even if they are intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the antitrust laws.

United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965); *Mid-Texas Communications Systems, Inc. v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1384 (5th Cir.), *cert. denied*, 101 S.Ct. 286 (1980); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076, 1082-83 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977).

Defendants' Proposed Instruction No. 28*

REGULATION AND THE RULE OF REASON

I told you earlier that you should consider the effect of federal and state regulation on the issue of whether Bell had monopoly power. If you find that Bell did not have monopoly power, you must return a verdict for Bell on the monopolization claim. Even if, however, you find that Bell did have monopoly power, Litton must still show that Bell willfully maintained its monopoly power by predatory or anticompetitive conduct. You should consider the effect of federal and state regulation on that question. Put another way, under the rule of reason, which I will explain in a moment, you should consider the effect of regulation in deciding whether Bell acted properly and reasonably or acted in a predatory or anticompetitive manner.

As we come to each category of challenged conduct, I will give you specific instructions on the regulatory framework applicable to that conduct. You have heard a great deal of evidence on the activities of the FCC and state regulatory agencies regarding much of Bell's challenged conduct. For now, I will tell you that to the extent Bell's conduct reflected an effort to comply with what Bell reasonably believed to be regulatory policies or obligations, you should not find such conduct predatory or anticompetitive.

In other words, if you find that Bell took certain actions because it reasonably believed those actions were required or were consistent with regulatory policies which promoted the public interest, you must find those actions reasonable and lawful.

This is because it would be unfair to penalize Bell under the antitrust laws for conduct that Bell reasonably thought was consistent with its obligations under federal and state regulatory laws and decisions. On the other hand, you should bear in mind that the reasonableness of Bell's conduct is not to be determined by regulatory decisions made after the conduct occurred. The controlling question is whether Bell's belief was reasonable in light of the regulatory context in which it was operating at the time of the action.

United States v. Marine Bancorporation, Inc., 418 U.S. 602, 627 (1975); *Silver v. N.Y. Stock Exchange*, 373 U.S. 341, 360–361 (1963); *Mid-Texas Communications v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1389–91 (5th Cir.), *cert. denied*, 101 S.Ct. 286 (1980); *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir.), *cert. denied*, 101 S.Ct. 208 (1980); *International Tel. & Tel. Co. v. General Tel. & Elec.*, 518 F.2d 913, 935–936 (9th Cir. 1975); *Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237–1239 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

See Defendants' Pretrial Memorandum at 61–66.

Defendants' Proposed Instruction No. 31*

INTERCONNECTION

Litton's first specific charge of predatory or anticompetitive conduct is in the area of interconnection. You have heard a great deal of evidence on the tariffs Bell filed after the *Carterfone* decision in 1968. These tariffs, as you know, permitted the interconnection of customer-provided equipment only through a so-called protective connecting arrangement, or "PCA", provided, installed, and maintained by the telephone companies. The parties do not dispute the contents of these tariffs; but they do disagree on whether or not these tariffs were reasonable. Litton contends that the PCA tariffs were filed in bad faith, were unnecessary to protect the telephone network from alleged harms threatened by un-

restricted interconnection, and were therefore unreasonable. Bell argues that the tariffs were a reasonable way of protecting the telephone network from these harms, and were therefore reasonable in light of all the circumstances. The question for your decision is whether Litton has proved by clear and convincing evidence that Bell's PCA tariffs were not at the time within the range of reasonable means of protecting the telephone network.

In deciding whether Litton has proved that by filing these tariffs Bell acted in a predatory or anticompetitive manner under the rule of reason, you must consider the effect of regulatory policy on Bell's decision. Bell has introduced evidence on its obligation to protect the efficient operation of the telephone network, its concern about the risks of various types of network harm from uncontrolled interconnection, the historical regulatory policy against interconnection, and the need for prompt action to protect the network in the wake of *Carterfone*. Litton, on the other hand, has offered evidence that Bell allegedly knew the PCA was technically unnecessary, but filed the tariffs because they would provide a competitive barrier.

Bell contends that its decision not to file tariffs which would have allowed unlimited interconnection was based on a reasonable belief that such tariffs would have been contrary to the public interest. If you find that Bell's PCA tariffs reflected a reasonable effort to protect the telephone network or to comply with what Bell reasonably believed to be regulatory policy, then you must find that filing and enforcing these tariffs was not predatory or anticompetitive conduct. In other words, if you find that Bell's purpose in filing these tariffs was to protect what it reasonably believed to be the public interest as defined by regulatory policy, then you must find Bell's conduct proper and reasonable. This is true whether or not the PCA was actually necessary; all that is required is Bell's reasonable belief that it was necessary. Even if you are not persuaded that Bell sought to protect the public interest

Litton still has the burden of proving that the conduct was predatory or anticompetitive.

In making this decision, you should consider all the evidence you have heard concerning the activities of state and federal regulatory bodies on interconnection both before and after the *Carterfone* decision.

Mid-Texas Communications v. American Tel. & Tel. Co., 615 F.2d 1372, 1389–90 (5th Cir.), *cert. denied*, 101 S.Ct. 286 (1980); *Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 354 (5th Cir.), *cert. denied*, 101 S.Ct. 208 (1980); *City of Groton v. Connecticut Light & Power Co.*, 497 F. Supp. 1040 (D. Conn. 1980); *Town of Massena v. Niagara Mohawk Power Corp.*, 1980–2 Trade Cas. (CCH) ¶ 63,526 (N.D.N.Y. 1980). *See MCI Communications Corp. v. American Tel. & Tel. Co.* (N.D. Ill. 1980), Jury Instructions, at 11,467; Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 Antitrust Bull. 559, 577–79 (1977).

See Defendants' Pretrial Memorandum at 15-26.

BELL'S WRITTEN OBJECTIONS TO THE DISTRICT COURT'S DRAFT INSTRUCTIONS

* * *

Effect of Federal and State Regulation (pp. 22–23)

Defendants object to this proposed instruction for six reasons.

* * *

(a) The instruction improperly implies that despite regulation, the application of the Sherman Act is not at all modified with respect to the furnishing of business telephone terminal equipment to customers (p. 22).

(b) The jury should be instructed that to the extent Bell's conduct reflected an effort to comply with what Bell reasonably believed to be regulatory policies or obligations, such conduct should not be found predatory or anticompetitive. *See* defendants' proposed instruction 28; *Mid-Texas Communications Systems,*

Inc. v. American Tel. & Tel. Co., 615 F.2d 1372, 1389–91 (5th Cir.), *cert. denied*, 101 S. Ct. 286 (1980).

* * *

Litton's Specific Claims (pp. 24–26)

* * *

(c) Plaintiffs' claim for damages as a user of the PCA should be dismissed as a matter of law under 1) the *Keogh* or "filed tariff" doctrine. . . .

* * *

First Amendment Protections; the Bad Faith Exception (pp. 41–43)

(a) Defendants contend that there is insufficient evidence to go to the jury on the issue of whether the challenged conduct falls within the sham exception as defined in this instruction.

(b) The proposed instruction does not make it clear that the right to petition applies regardless of any anticompetitive intent Bell may have had—the only issue under the sham exception is whether Bell truly wanted the government action sought and did not lie to the FCC about it.

Interconnection/Opposition to Registration (pp. 44–45)

(a) The questions for the jury's decision contained in this instruction are inconsistent with the previous instruction on the right to petition. The jury must first find that Bell's filing of the PCA tariffs falls within the sham exception. If the jury so finds, then it must decide the reasonableness issue. The same defect is contained in the proposed instruction on opposition to registration, with an additional error in that Bell's purpose in opposing registration is legally irrelevant under *Noerr-Pennington*.

* * *

EXCERPTS FROM DISTRICT COURT'S INSTRUCTIONS AND TRANSCRIPT (18012–18241)

Effect of Federal and State Regulation

* * *

There are several parts to the Bell System defendants' business. One part is the central station or central switching network, which, to the extent it's local in nature, is a lawful monopoly not subject to the Sherman Act.

Another part of the business is the making and furnishing of telephone terminal equipment, including PBX and key systems, to customers. With respect to this latter part of the business, the Bell System defendants are subject to the requirements and obligations of the Sherman Act.

While certain aspects of this part of the defendants' business are subject to regulation by the states, it has been held by the courts that state regulation does not immunize defendants' conduct from the Sherman Act unless that conduct is ordered by a state regulatory agency pursuant to state legislative directive and not merely permitted by state regulation.

Further, state regulatory agencies may not restrict the use or requirements for the use of telephone terminal equipment from one state to another, even though that equipment is also used in making local and intrastate calls.

Although regulation does not provide Bell with immunity from the antitrust laws in the telephone terminal equipment market, regulation is one factor you should consider in determining the purpose and reasonableness of the defendants' acts and practices.

* * *

LITTON'S SPECIFIC CLAIMS

* * *

I will now instruct you on the specific alleged practices by which Litton claims Bell maintained its alleged monopoly power in the relevant market.

INTERCONNECTION TARIFFS

Bell's first specific charge of predatory or anticompetitive conduct is in the area of interconnection. You have heard a great deal of evidence concerning the tariffs which Bell filed after the *Carterfone* decision in 1968. These so-called post-*Carterfone* tariffs, as you know, permitted the interconnection of customer-provided equipment only through a so-called interface device or protective connecting arrangement, or PCA, which was provided, installed and maintained by the telephone companies. The parties do not dispute the contents of these tariffs, but they do disagree on whether or not the tariffs were reasonable.

* * *

The question for your decision is whether Litton has proved that Bell's PCA tariffs were filed in bad faith. In determining that question, you may consider whether Bell knew or should have known at the time that the interface device was not a reasonable means of protecting the telephone network because the establishment of standards for competitive terminal equipment was a practical method of affording such protection.

OPPOSITION TO REGISTRATION

You have also heard about Bell's opposition to proposals made before the FCC that the PCA tariffs be replaced by various programs of certifying or registering equipment with the FCC. The question for your decision is whether Bell's opposition was interposed in bad faith for the purpose of excluding competition or

whether Bell took this position because it believed that the registration proposals being made were not in the public interest and would not provide sufficient protection to Bell System employees, customers and the telephone network.

THE LEAST RESTRICTIVE ALTERNATIVE

As a general proposition, the Sherman Act imposes no obligation on a public utility to propose tariffs which are the least restrictive to competition. The test is whether Bell's conduct was reasonable at the time under all the circumstances or whether it was predatory and anticompetitive. You therefore must consider whether the tariffs were reasonable in light of all the circumstances at the time, weighing the need for protection of the network against the costs to the customer and the effects on competition.

In considering the effects on competition, you may take into account the availability of the interface devices, including the length of time it would take to design and manufacture these devices for all of the different types of competitive terminal equipment, the cost of the interface devices relative to the cost of the terminal equipment, and the difficulties of promulgating and enforcing certification standards.

FIRST AMENDMENT PROTECTION AND THE BAD FAITH EXCEPTION

Certain categories of alleged predatory or anticompetitive conduct by Bell, including the filing and defense of tariffs and opposition to registration involve activities which Bell contends are protected by the First Amendment to the United States Constitution. In deciding whether or not Bell's conduct in these two areas was predatory or anticompetitive and thus whether it amounted to wilful maintenance of monopoly power, you must keep in mind that certain types of conduct are indeed protected by the First Amendment and cannot form the basis for an antitrust violation.

Under the First Amendment, both persons and corporation have a right to act either individually or jointly in petitioning the government for redress of grievances. Under the First Amendment they also have the right to speak freely on matters of public concern without fear of prior restraint or subsequent punishment.

The right to petition the government for redress of grievances, either jointly or singly, covers all instances where persons or corporations seek in good faith to bring about the action of some branch of government, federal or state, in their favor. That right includes the right to go to court, either to bring a lawsuit or to defend one, or to intervene in lawsuits brought by others. It further protects the right to go before administrative agencies, such as the Federal Communications Commission or state regulatory agencies, to seek the adoption of new regulations or the repeal of old ones, to institute proceedings, to defend proceedings and to intervene in proceedings instituted by others.

Many of these actions, if successful, might be harmful to a competitor. Nevertheless, the First Amendment guarantees that persons or corporations may participate in good faith efforts to influence the passage or enforcement of laws or government regulations or to influence public officials regardless of whether the results of the government action they seek would be harmful to competition.

The reason why such actions are not covered by the Sherman Act is that the Supreme Court has ruled that Congress, in passing that act, could not have intended to inhibit the freedom to petition the government guaranteed by the First Amendment or to interfere with the constitutional framework of representative government.

You are also instructed that petitioning an administrative agency such as the FCC or seeking review in the courts may result in delays because administrative or judicial procedures are often

time consuming. Creating such delays does not constitute wilful exercise of monopoly power as long as the petition or application to the courts is based on a good faith interest in influencing the agency or obtaining a court ruling.

However, there is an exception to the general rule that efforts to influence public officials do not violate the antitrust laws, and that is the so-called sham or bad faith exception. If a campaign, ostensibly directed toward influencing government action, is a mere sham or artifice to cover what is essentially nothing more than an attempt to smother competition by a pattern of knowingly filing baseless claims or making misrepresentations to administrative agencies in a way designed to deprive competitors of meaningful access to those agencies, the First Amendment protections are lost and the Sherman Act applies.

In considering whether Bell's filing of tariffs or opposition to registration constituted wilful maintenance of monopoly power, therefore, you must decide whether or not they fall within the bad faith exception as I have just explained it to you.

* * *

THE CLERK: Madam Foreperson, has the jury agreed upon a verdict?

THE FOREPERSON: We have.

THE CLERK: Claim one, monopolization Question number 1: Did defendants possess monopoly power in a relevant market? Your answer, please.

THE FOREPERSON: Yes.

THE CLERK: Question number 2: If so did defendants wilfully maintain such monopoly power by predatory or anti-competitive conduct? Your answer, please.

THE FOREPERSON: Yes.

THE CLERK: Question number 3: If so, was such wilful maintenance of monopoly power a proximate cause of injury to plaintiffs? Your answer, please.

THE FOREPERSON: Yes.

THE CLERK: Claim 2, attempted monopolization. Question number 4: Did defendants have a specific intent to obtain monopoly power in a relevant market? Your answer?

THE FOREPERSON: Yes.

THE CLERK: Question number 5: If so, did defendants attempt to obtain such monopoly power by anti-competitive or predatory conduct? Answer, please.

THE FOREPERSON: Yes.

THE CLERK: Question number 5: If so, was there a dangerous probability that defendants would succeed in obtaining such monopoly power? Your answer please.

THE FOREPERSON: Yes.

THE CLERK: Question number 7: If so was such attempt a proximate cause of injury to plaintiffs? Your answer.

THE FOREPERSON: Divided.

THE CLERK: Claim number 3, conspiracy to monopolize. Question number 8: Did AT&T and one or more of the Bell companies, acting as separate entities conspire or agree to monopolize a relevant market? Answer, please.

THE FOREPERSON: No.

THE CLERK: Question number 9: If so did these companies have the specific intent to maintain monopoly power in the relevant market? Your answer.

THE FOREPERSON: No.

THE CLERK: Question number 10: If so did any of the conspirators commit any overt acts in furtherance of the conspiracy?

THE FOREPERSON: No.

THE CLERK: Question number 11: If so was the conspiracy a proximate cause of injury to plaintiffs?

THE FOREPERSON: No.

THE CLERK: Claim number 4, conspiracy in restraint of trade. Question number 12: Did AT&T and one or more of the Bell companies, acting as separate entities conspire or agree to engage in conduct which unreasonably restrained trade? Answer?

THE FOREPERSON: No.

THE CLERK: Question number 13: If so, was any such conduct a proximate cause of injury to plaintiffs?

THE FOREPERSON: No.

THE CLERK: Go to question 14: What amount of money will fairly and reasonably compensate plaintiffs for the injuries they sustained to their telephone terminal equipment business as a proximate result of the violation or violations which you have found?

THE FOREPERSON: $91,990,000.

THE CLERK: Question 15: If you have found under any one or more of the four claims that the interface device requirement was a violation of the antitrust laws, what amount of money will fairly and reasonably compensate plaintiffs for the injuries they sustained by having to pay for the installation and monthly rentals of defendants' interface devices, as a proximate result of such violation?

THE FOREPERSON: $268,243.

THE CLERK: Question number 16: On which of the following alleged practices of defendants have you based your finding of predatory or anticompetitive conduct:

a. Filing of the interface device tariff in bad faith?

Your answer.

THE FOREPERSON: We are divided.

THE CLERK: b. Intentional delay in providing and installing interface devices?

THE FOREPERSON: Yes.

THE CLERK: c. Opposing certification in bad faith?

THE FOREPERSON: Yes.

THE CLERK: d. Intentionally providing unduly expensive, inefficient or unreliable interface devices?

THE FOREPERSON: No.

THE CLERK: e. Intentional pricing of PBX and key telephone services below incremental costs?

THE FOREPERSON: No.

THE CLERK: f. Discriminating against purchasers of competitive terminal equipment in the price of network service?

THE FOREPERSON: No.

THE CLERK: g. Misuse of information obtained through supplying of the interface devices to attempt to cause customers who have indicated their intention to purchase competitive equipment to lease Bell equipment instead?

THE FOREPERSON: No.

THE CLERK: h. Bad faith refusal to sell inside wiring at all or on a reasonable basis?

THE FOREPERSON: Yes.

THE CLERK: i. Bad faith delay in making cutovers?

THE FOREPERSON: We are divided.

* * *

APPENDIX F

***AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605 (1968)**

FCC 68-1234

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMERICAN TELEPHONE AND TELEGRAPH CO. (A.T. & T.)
"Foreign Attachment" Tariff Revisions in A.T. & T. Tariff FCC Nos. 263, 260, and 259

MEMORANDUM OPINION AND ORDER

(Adopted December 24, 1968)

BY THE COMMISSION: COMMISSIONER COX CONCURRING IN THE RESULT; COMMISSIONER WADSWORTH ABSENT; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. We have before us new tariffs and supporting papers filed recently by the American Telephone and Telegraph Co. (A.T. & T.) in behalf of itself and other telephone companies wherein it is proposed to effectuate significant changes in the foreign attachment provisions now appearing in certain tariffs of A.T. & T. These provisions govern the connection or attachment of customer-provided facilities to common carrier-provided facilities used in furnishing interstate or foreign communications services to the public. The particular services affected by these new tariffs are long-distance-message telecommunications service or message toll telephone service (tariff No. 263); private line service (tariff No. 260), and wide-area telecommunications service or WATS (tariff No. 259). The new tariffs are published to become effective, in part, on January 1, 1969, and, in part, on January 1, 1970. Appendix A hereof identifies the aforesaid new and revised schedules and supporting documents submitted by A.T. & T. In addition, we have before us a number of formal and informal pleadings and comments that have been submitted in response to the new tariffs. See appendix B.

2. Many of the responsive pleadings request us to reject, suspend, or investigate the new tariffs in whole or in part. Others submit comments and observations on the new tariffs without requesting any specific action by the Commission at this time. A.T. & T. urges us to permit the new tariffs to go into effect as scheduled without hearing or investigation. We believe that it will be useful to outline the salient features of the changes proposed by the new tariffs and the questions presented before stating our disposition of the matter before us.

I. Description of Changes

A.T. & T. TARIFF FCC NO. 263

3. The pleadings and comments are addressed principally to the new tariffs as they affect A.T. & T.'s tariff FCC No. 263. This tariff applies to the message toll telephone service, which is to be renamed "long-distance-message telecommunications service" under the new tariffs.

4. The nature of the changes proposed for A.T. & T. tariff FCC No. 263 will be more easily understood by making clear at the outset the nature of the service offered by the telephone companies under this tariff. This service utilizes the nationwide switched network of more than 2,000 cooperating telephone companies extending throughout the country. The network consists of (1) the telephone set, usually located on the customer's premises; (2) the pair of wires, or loop, and its supporting structures, which connect the telephone set to the central office; (3) the switching equipment in the central office; and (4) the trunk facilities that connect central offices to each other.

5. For years the tariffs on file with this Commission governing this service offering have made it clear that this service consists of the furnishing of facilities for the public to make interstate or foreign telephone calls between telephones, that is to say the service is now and has for many years been offered only as a complete service that includes the furnishing of the telephone itself with certain exceptions hereafter noted. Thus, the presently effective Tariff 263 states that the service offered thereunder "is that of furnishing facilities for telephone communication *between telephones* in different local service areas" and that the interstate and foreign toll charges shown in the tariff "are in payment for all service furnished *between the calling and called telephones*" (2.1.1(A)). (Our italic.)

6. With respect to the revisions in the message toll tariff, several important features emerge. First, the new tariffs would delete currently effective paragraph 2.6.1 which, in pertinent part, now reads as follows:

> No equipment, apparatus circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction or otherwise * * *.

Also they would delete currently effective paragraph 2.6.9 which begins with the following language:

> The provisions of paragraph 2.6.1 preceding shall not be construed or applied to bar * * *.

Second, in addition to canceling the above-cited paragraphs, the new tariffs would publish new provisions as follows:

> 2.6.1
> Customer-provided *terminal equipment* may be used with the facilities furnished by the telephone company, for long-distance-message telecommunications service, as specified in 2.6.2 through 2.6.6 following;
> 2.7.1
> Customer-provided *communications systems* may be connected with the facilities furnished by the telephone company for long-distance-message telecommunications service as specified in 2.7.2 through 2.7.10 following. (Our italic.)

7. As indicated above, the new tariffs will permit any kind of customer-provided terminal equipment (e.g., a computer) or customer-provided communications system (e.g., a private microwave system) to be attached to or connected to the telephone company facilities subject to the specifications set forth in the new tariff. Thus, an important feature of the revisions is the new set of conditions, referred to above, that are to govern the interconnection of such terminals and systems.

8. In the case of both customer terminals and systems, it will be the general responsibility of the customer to assure that his terminal or system shall not interfere with any of the services offered by the telephone company, nor endanger the company's employees or the public, or damage or change the company's equipment or facilities (2.6.2 and 2.7.2). Also in the case of both customer terminals and systems, all network control signaling functions are to be performed by equipment that is furnished, maintained, and installed by the telephone company (2.6.3 and 2.7.3), with exceptions. These exceptions, which have been in existence for some time, apply under limited conditions to systems of power, pipeline, and railroad companies, National Aeronautics and Space Administration, U.S. Army, Navy, and Air Force, and to systems or terminals of customers located in isolated, sparsely developed, hazardous, or inaccessible locations (2.7.4, 5, 6, and 7). Network control signaling is defined in the new tariffs as the transmission of signals used in the telecommunications system which perform functions such as supervision (control, status, and charging signals), address signaling (e.g., dialing), calling and called number identification, audible tone signals (call progress signals indicating reorder or busy condition, alerting, coin denominations, coin collect and coin return tones) to control the operation of switching machines in the telecommunication systems. The ordinary telephone set as used in the message toll service is a network control signaling unit.

9. The new tariffs divide customer terminals into three categories: Data transmitting or receiving equipment (data), voice transmitting or receiving equipment (voice), and accessories.

10. At the customer's option the aforementioned data terminals may be connected to the telephone company facilities either by direct electrical connection (i.e., physical connection of electrical conductors) or indirectly (i.e., acoustic or inductive connections). If the option is for direct electrical connection, the data customer has a further choice of (*a*) using either the telephone company's dataphone set, which performs not only the network control signaling functions but also the functions of a modem (modulation and demodulation of signals), or (*b*) using an interface called a data access arrangement, furnished by the telephone company, in lieu of the dataphone. Such an interface does not perform the modem function, so that this option allows the customer to provide his own modem rather than using that of the telephone company. If the customer's option is for a direct electrical connection through a data access arrangement rather than through a dataphone, then the customer's data terminal must meet certain technical criteria that are set forth in detail in appendix C hereof.

11. If instead of a direct connection, the data customer chooses to

connect his data terminal indirectly, he may do so by acoustic or inductive connections made externally to the telephone company's network control signaling unit. No telephone company interface is required therefore and no technical criteria are specified for such indirectly connected data terminals in the new tariffs published to be effective January 1, 1969. However, the new tariffs specify that, effective a year later, on January 1, 1970, the technical criteria for such indirectly connected data terminals shall be as shown in appendix D hereof.

12. The second, or voice, category of customer terminals may also be connected either directly or indirectly. If direct connection is used, such a terminal must use a telephone company interface called a connecting arrangement, and the terminal must meet the technical criteria set forth in appendix C hereof. If indirect connection is used, such connection must be made externally to the telephone company's network control unit. However no other interface is required and no technical criteria will apply until January 1, 1970. On and after that date the criteria shall be as shown in appendix D.

13. Accessories are customer terminal devices of a mechanical nature that do not involve electrical connection, directly or indirectly, to the telephone company facilities. These terminals are not subject to the technical criteria required for data and voice terminals, but are subject to the other requirements of the tariff applicable to all terminals.

14. Insofar as the interconnection of customer systems is concerned, the new tariffs impose the same technical criteria on these customer-provided facilities as apply to terminals. Thus, the new tariffs will permit either direct connection thereof through a connecting arrangement interface provided by the telephone company or through an indirect acoustic or inductive connection made externally to the telephone company's network control signaling unit. If a customer system is to be interconnected directly, it must meet the technical criteria set forth in appendix C. If it is to be connected indirectly by acoustic or inductive means, no technical criteria will apply until January 1, 1970, when the criteria shown on appendix D must be met.

15. A.T. & T. states that the purpose of the 1-year postponement of the technical criteria in appendix D for indirect connections is to give customers having acoustic or inductive devices that do not currently meet the new criteria additional time to accommodate themselves to these criteria.

A.T. & T. TARIFF FCC NO. 259

16. This tariff applies to wide-area telecommunications service or WATS. It is a voice grade service that is provided over the same nationwide switched network used for message toll service. The new and revised tariffs propose in substance to make the same revisions in WATS as outlined above for the message toll service.

A.T. & T. TARIFF FCC NO. 260

17. This tariff applies to private-line service. This is a separate service that does not use the switched telephone network. Changes com-

parable to those referred to above for message toll and WATS are not being proposed at this time for the private-line service. However, the private-line-service tariff is being revised, effective January 1, 1969, to make a new private-line offering whereby customers may obtain private lines of not more than 25 airline miles to connect their own voice-grade private channels to the telephone company message toll telephone network. These private-line facilities are called entrance facilities. They may not be used to connect a customer terminal or system to private-line facilities of the telephone company.

18. A.T. & T. has advised the Commission by letter dated December 6, 1968, that it expects to make further revisions in its private-line-service tariff comparable to those made in the message toll and WATS tariffs, shortly after January 1, 1969.

II. Questions Presented

19. As heretofore stated, the objections that have been filed are aimed principally at the revisions in the message toll tariff No. 263. The contention is made that these revisions do not comply with our *Carterfone* decision, *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service*, 13 FCC 2d 420, 14 FCC 2d 571. Objections are also made to the revisions in the WATS and private-line tariff for the same reason.

20. Accordingly the principal question raised by the pleadings and comments is whether the new and revised tariffs, in whole or in part, are in violation of our decision in *Carterfone*, and, if so, what action we should take with respect thereto. In addition, the question is raised as to whether, apart from compliance or noncompliance with *Carterfone*, there appear to be any other question of lawfulness that would warrant suspension, investigation, or action by the Commission at this time and, if so, the nature thereof.

III. Discussion

21. The contention is made that the new and revised message toll tariffs do not comply with our decision in *Carterfone* because the new filings bar the use of any customer-provided network control signaling units irrespective of whether they are harmful or harmless to the rest of the message toll telephone system. It is argued that such a bar is an *a priori* assumption of harm that we found in *Carterfone* to be unreasonable.

22. We believe that this particular objection is based upon a misconstruction of what we decided in *Carterfone*. We were concerned in that case with the lawfulness of tariff provisions that prohibit a customer from making harmless interconnection of his terminals or systems with the message toll telephone system of the telephone companies. As we have heretofore stated, this telephone system includes the telephone instrument which performs the network control signaling functions for message toll telephone service. We were therefore concerned with what could be connected or attached to this telephone system. Our decision in *Carterfone* does not hold that a customer may substitute his own equipment or facilities (whether it be

telephone instruments, loops, poles, or central office equipments) for that furnished by the telephone company in providing message toll telephone service as that service is defined in the tariff. Our decision dealt with interconnections and not replacements of any part of the telephone system. We emphasized this in our decision where we stated that "our conclusion here is that a customer desiring to use an interconnecting device to improve the utility to him of both the telephone system and a private radio system should be able to do so, so long as the interconnection does not adversely affect the telephone company's operation or the telephone system's utility to others." 13 FCC 2d at page 424. In denying petitions for reconsideration we again made this clear by stating that "General has contended that the Commission has 'opened the door to customer ownership of telephone handsets.' The facts of this case did not involve the furnishing of purely telephone system equipment telephone-to-telephone on *the message toll telephone system*." 14 FCC 2d 571 at page 572. (Our italic.)

23. Although the tariff bar against any customer providing his own network control signaling unit is not in conflict with our *Carterfone* ruling, the question remains as to whether the telephone companies should make provision in their tariffs by which subscribers may have access to the so-called switched telephone network through the use of their own provided network control signaling equipment. On the basis of the pleadings and comments before us, we are in no position to determine the extent to which any such provision may be consistent with efficient and economic telephone service and otherwise in the public interest. In our opinion, these and other matters warrant further consideration by the Commission before it determines whether and what further action, if any, may be required. We believe that we will be in a better position to make these determinations after we have had a reasonable opportunity to closely observe the effects of the substantial changes now being effectuated by the telephone companies in their interconnection tariffs, the extent to which such changes satisfy reasonable requirements of their subscribers for data transmission and other communication services or facilities, and the implementation by the telephone companies of their representations that they are actively engaged in devising equipment and operating procedures to meet the expressed needs of customers for flexible access to the switched network. Thus, we will permit the tariff revisions to become effective as scheduled with the understanding that in doing so we are not giving any specific approval to the revised tariffs.

24. We are also instructing the chief of the Common Carrier Bureau to initiate promptly a series of informal engineering and technical conferences with the telephone industry and interested manufacturers, user groups, and Government agencies to ascertain what further changes are necessary, desirable, and technically feasible in the various tariff offerings of the telephone companies. It is our intent that these further informal proceedings shall be broad in scope and that they will provide a principal forum for the identification, examination, and, subject to Commission review, resolution of any questions presented by the tariff revisions. We are aware, for example, that there

are a number of unresolved specific questions, which we need not delineate herein, that are raised both in the pleadings and in the separate analysis of our own staff. These may require further action by the Commission. Some of these problems can reasonably be expected to be satisfied by further tariff amendments, such as additional revisions in the private-line tariffs which are scheduled to be made early in 1969, and provisions for unattended operation of a large variety of customer-data terminals, which provisions, according to the telephone companies' commitment, will become possible by the middle of 1969 when appropriate equipment and arrangements therefor will have been developed. Other tariff changes may be necessary or desirable, both of a substantive and clarifying nature, to respond to other questions that have arisen and that are likely to arise. Accordingly, the further proceedings will include, among other things, consideration of what changes, if any, should be made in the technical criteria and other conditions for interconnection and other matters of clarity and substance raised by the pleadings and comments. The staff will submit periodic reports to the Commission, with appropriate recommendations, and the Commission will be prepared to take such further action as it deems necessary or desirable to resolve outstanding issues.

25. We are of the opinion that the further informal procedures that we are here initiating, together with the information gained from the pending computer inquiry (docket No. 16979), will greatly assist the Commission in carrying out its statutory obligations herein. Through such procedures we expect to obtain valuable technical and operational information on a current and continuing basis and from a variety of sources that will aid us in our evaluation of the public interest factors involved in the new tariffs now being put into effect, as well as any new or revised tariffs that are expected to be proposed for the future or that may otherwise be required.

26. We will also welcome the cooperation and participation in the further proceedings of the National Association of Regulatory Utility Commissioners on behalf of the State regulatory commissions which have a substantial interest in the matters yet to be determined herein.

IV. Conclusion

27. In view of the foregoing, we conclude that we should permit the new and revised tariffs to go into effect, as now scheduled, on January 1, 1969, without scheduling a formal investigation or hearing at this time. Our action is not to be construed as approval thereof and these tariffs are subject to such further action as the Commission may wish to take with respect thereto.

28. *Accordingly, it is ordered*, That the various pleadings and requests for rejection and suspension or formal investigation of the aforementioned new and revised tariffs *Are hereby dismissed* without prejudice.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX A

Tariffs and Supporting Documents

1. A.T. & T. transmittal letter No. 10240, dated September 13, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).

2. A.T. & T. transmittal letter No. 10249, dated October 2, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).

3. A.T. & T. (unnumbered) letter to FCC, dated October 4, 1968, stating, among other things, intent to offer in future station equipment to permit unattended operation of data terminal (i.e., automatic calling and answering), and to require A.T. & T. dataphone sets to meet tariff technical criteria (relating to proposed revisions in tariff FCC No. 263).

4. A.T. & T. transmittal letter No. 10267, dated October 18, 1968 (relating to proposed revisions in A.T. & T. tariff FCC No. 263).

5. A.T. & T. transmittal letter No. 10270, dated October 22, 1968 (relating to proposed revisions in A.T. & T. tariff FCC Nos. 263 and 260).

6. A.T. & T. (unnumbered) letter to FCC, dated October 29, 1968, stating intent to offer facilities by middle of 1969 to permit automatic connection of customer-provided PBX and intercom-type system to the long-distance telecommunication network (tariff FCC No. 263).

7. A.T. & T. transmittal letter No. 10281 to FCC, dated October 30, 1968 (relating to proposed revisions in tariff FCC Nos. 263 and 260).

8. A.T. & T. transmittal letter No. 10291, dated November 12, 1968, and revised pages to A.T. & T. tariff FCC No. 263 submitted therewith; reissuing and revising tariffs submitted under transmittal Nos. 10240, 10249, 10267, 10270, and 10281.

9. A.T. & T. letter (unnumbered) of November 15, 1968, to FCC and enclosed statement in support of provision in new and revised tariffs that connection of customer-provided terminal and systems shall be made through a network control signaling unit furnished, installed, and maintained by the telephone company.

10. A.T. & T. transmittal letter No. 10293, dated November 15, 1968, and revisions submitted therewith in A.T. & T.'s tariff FCC No. 259 (wide-area telecommunication service).

11. A.T. & T. transmittal letter No. 10294, dated November 18, 1968, and revisions submitted therewith in A.T. & T.'s tariff FCC No. 260 (private-line service) re entrance facilities for use in customer connection's to the switched telephone network.

12. A.T. & T. letter (unnumbered), dated December 6, 1968, advising it as to when further revisions will be made in A.T. & T. tariff FCC No. 260 (private-line service).

13. A.T. & T. letter (unnumbered), dated December 13, 1968, in reply to pleadings and comments filed in response to aforementioned new and revised tariffs.

APPENDIX B

Tel-Plan, Inc.—Comments on the proposed tariff revisions in tariff Nos. 259, 260, and 263, filed December 10, 1968.

Aeronautic Radio, Inc. (ARINC).—Comments on the proposed tariff revisions in tariff No. 260, filed December 6, 1968.

Charles W. Schweizer Associates, Inc.—Comments on the proposed tariff revisions in tariff No. 263, filed December 11, 1968.

The Data and Graphic Communications Section of the Electronics Industries Association petition.—Protesting and opposing proposed tariff revisions in tariff 263 and for investigation, filed December 2, 1968.

National Retail Merchants Association (NRMA).—Comments on the proposed tariff revisions in tariff No. 263, and request for acceptance of the tariff filing, filed December 2, 1968.

Bethlehem Steel Corp. et al.—Revised petition to reject certain tariff provisions in tariff No. 263, filed November 26, 1968, and supplemental petition to reject tariff filing, filed December 2, 1968.

TELCON Associates, Inc.—Comments on the proposed tariff revision in tariff No. 263, filed November 15, 1968, and a supplemental statement commenting on the proposed tariff revisions in tariff Nos. 259, 260, and 263, filed December 4, 1968.

Computer Security Systems.—Petition objecting to certain revisions in tariff No. 263 and asking that they be rejected, filed December 3, 1968.

Photo Magnetic Systems, Inc.—Letter objecting to certain revisions in tariff No. 263, filed November 22, 1968, and a petition to reject certain provisions of tariff No. 263, filed December 2, 1968.

Ripley Co.—Comments on the proposed tariff revisions of tariff No. 263 and request for appropriate relief, filed December 2, 1968.

Small Business Administration.—Statement supporting the suspension and investigation of certain revisions in tariff No. 263, filed December 2, 1968.

Aerospace Industries Association of America, Inc. (AIA).—Petition for rejection of certain revisions of tariff No. 263 and for other relief, filed December 3, 1968.

United States.—Memorandum requesting investigation of a specific revision in tariff No. 263, filed December 2, 1968.

Altone Systems, Inc.—Petition for rejection of certain revisions in tariff No. 263, filed October 15, 1968, and a supplemental letter, filed December 2, 1968.

Xerox Corp.—Supplemental pleading withdrawing objection to certain revisions in tariff No. 263 and additional comments, filed November 29, 1968.

Microwave Communications, Inc. (MCI).—Petition to reject certain tariff revisions in tariff No. 263 and for other relief, filed December 3, 1968.

Thomas F. Carter, Carter Electronics Corp. and Carterfone Communications Corp.—Petition for rejection of tariff revisions or, in the alternative, for suspension, investigation, and hearing, and for other relief, filed December 2, 1968.

Plessey, Inc.—Petition for investigation of tariff Nos. 259, 260, and 263, filed December 4, 1968.

Marcom, Inc.—Supplemental petition to reject certain revisions in tariff No. 263 and comments on network control signaling, filed December 2, 1968.

Secretary of Defense (DOD).—Petition for suspension and investigation of certain tariff revision in tariff No. 263, filed December 2, 1968.

ACTION! Systems Co.—Comments on the proposed revisions in tariff No. 263, filed November 29, 1968.

National Committee for Utilities Radio (NCUR).—Supplemental petition for rejection of certain revisions in tariff No. 263, filed December 3, 1968.

International Telephone & Telegraph Corp. (ITT).—Supplemental petition for rejection in certain tariff revisions or, in the alternative, suspension, investigation, and hearing, filed November 29, 1968.

Magnavox Co.—Petition to reject certain revisions in tariff No. 263, and for other relief, filed November 27, 1968.

American Trucking Association (ATA).—Petition to reject certain proposed tariff revisions in tariff No. 263, filed November 29, 1968.

Business Equipment Manufacturers Association (BEMA).—Supplemental petition to reject certain proposed tariff revisions in tariff No. 263, filed November 27, 1968.

American Petroleum Institute.—Comments on proposed tariff revisions and requests for acceptance of the tariff filing, filed November 27, 1968.

The American Bankers Association.—Comments concerning the revisions in tariff No. 263, filed November 27, 1968.

Western Data Products, Inc.—Letter commenting on the proposed tariff revisions, filed November 22, 1968.

American Trucking Association, Inc.—Petitions to reject proposed tariff revisions to tariff Nos. 259 and 260, filed December 12, 1968.

Magnavox Co.—Petition to reject proposed revisions in tariff No. 259, filed December 17, 1968.

Business Equipment Manufacturers Association (BEMA).—Comments on the proposed revisions to tariff Nos. 259 and 260, filed December 18, 1968.

Bethlehem Steel Corp. et al.—Petitions to reject proposed revisions in tariff Nos. 259 and 260, filed December 17, 1968.

APPENDIX C

Technical Criteria for All Terminals and Systems Connected by Direct Electrical Connection, Effective January 1, 1969

1. The power of the signal at the central office shall not exceed 12 db below 1 mw when averaged over any 3-second interval.

ii. The signal at the telephone company interface located on the customers' premises shall be controlled so that:

1. The power in the band from 3,995 to 4,005 Hz shall be at least 18 db below the power of the signal as specified in i., above.

2. The power in the band from 4,000 to 10,000 Hz shall not exceed 16 db below 1 mw.

3. The power in the band from 10,000 to 25,000 Hz shall not exceed 24 db below 1 mw.

4. The power in the band from 25,000 to 40,000 Hz shall not exceed 36 db below 1 mw.

5. The power in the band above 40,000 Hz shall not exceed 50 db below 1 mw.

6. The signal shall at no time have energy solely in the 2450–2750 Hz band and any signal power in such band shall not exceed the power present at the same time in the 800–2450 Hz band.

APPENDIX D

Technical Criteria for All Terminals and Systems Connected by Acoustic or Inductive Means, Effective January 1, 1970

i. The power of the signal at the output of the network control signaling unit shall not exceed 9 db below 1 mw when averaged over any 3-second interval, and such signal at such output point shall be controlled so that:

1. The power in the band from 3,995 to 4,005 Hz shall be at least 18 db below the power of the signal as specified in i., above.

2. The power in the band from 4,000 to 10,000 Hz shall not exceed 16 db below 1 mw.

3. The power in the band from 10,000 to 25,000 Hz shall not exceed 24 db below 1 mw.

4. The power in the band from 25,000 to 40,000 Hz shall not exceed 36 db below 1 mw.

5. The power in the band above 40,000 Hz shall not exceed 50 db below 1 mw.

6. The signal shall at no time have energy solely in the 2450–2750 Hz band and any signal power in such band shall not exceed the power present at the same time in the 800–2450 Hz band.

Carterfone Tariffs

(In the matter of A.T. & T. "Foreign Attachment" tariff revisions—Nos. 259, 260, 263)

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

The 11-year-long saga of the *Carterfone* case involves, in general, the competitive structuring of this country's communications network. A small manufacturer, Tom Carter, sought to market an invention enabling the user to couple a telephone handset to a mobile radio transmitter. The telephone company, through its jingoist-titled "foreign attachment" tariff, opposed his efforts. For A.T. & T. has consistently held to the position that it is entitled to a monopoly not only of the Nation's switching system and communications lines, but of all consumer equipment "attached" to its system as well. (A distant analogy might be suggested if an electric power company were to insist on a monopoly of the manufacture, installation, and repair of toasters, television sets, and all other electrical appliances that could be plugged into an electric wall socket.) Yielding not an inch, A.T. & T. has consistently and successfully fought off for years the Tom Carters of the communications industry.

But Tom Carter persisted. For 11 long years he persisted. And then, finally, earlier this year, the FCC held the foreign attachment tariffs illegal and authorized Tom Carter to go ahead with the sale of his device. *Carterfone*, 13 FCC 2d 420 (1968). The Commission's opinion was heralded as a commendable effort to open up competition in the communications business.

As experienced reformers have long since discovered, however, the political victories that are won after long struggle under the light of public scrutiny can be very quickly lost in the dark backrooms of practical implementation. The new legislation or agency decision is praised and then forgotten. And when—if ever—anyone goes back to see how it all worked out he finds the situation very little changed from before. The swamp waters have returned to their former level.

And so it was, shortly after the Commission's *Carterfone* decision, that A.T. & T. petitioned for a stay of its effectiveness and for a reconsideration of the decision. The Commission's Common Carrier Bureau did not oppose the stay, and the Commission granted it until November 1, 1968—over the dissents of Commissioner Cox and myself. *Carterfone*, 14 FCC 2d 149, 151 (1968). When the Commission affirmed its decision on reconsideration, *Carterfone*, 14 FCC 2d 571 (1968), the telephone company went to court. Subsequently, A.T. & T. asked for and was granted, another extension of the stay of the effective date of the decision from November 1, 1968, to January 1, 1969. *Carterfone*, 15 FCC 2d 31 (1968).

All these delaying tactics are well known, and fully exercised by A.T. & T. What A.T. & T. had not counted on, however, was that its first tariff proposal would be watched by small businessmen from across the country in addition to Mr. Carter—and that they would send up howls of protest when they saw what A.T. & T. was trying to do. For A.T. & T.'s first proposals were designed to be drawn very narrowly in an effort to render this landmark decision of limited practical effect.

Having been publicly caught in this untenable posture, Bell quickly shifted to its present position. It has now offered tariffs which are somewhat more liberal—but it insists that from now on all proceedings be conducted off the record.

These new tariffs raise three separate questions. First, who is to own and control the network signaling device—the dial mechanism that imparts control signals to the telephone system? Bell argues that only it can control this part of the overall telephone system. International Telephone & Telegraph sees no reason why the domestic telephone handset market should be a virtual monopoly. The Department of Justice believes the Commission should formally investigate this question. The majority concludes that a tariff bar against a customer-provided network control device is not in violation of the *Carterfone* ruling. It is my view that such a bar does violate the spirit of *Carterfone* and its reasonableness should be investigated in a formal proceeding.

Secondly, there is the question of how well these new tariff provisions are going to work, what their effect will be, and what the literal words of the tariff mean operationally. This is the arena, of course,

in which this ballgame will ultimately be won or lost. Disagreement between the parties is most likely in view of the past history of the foreign attachment question.

Finally, a number of parties have raised specific questions about parts of the tariffs Bell has filed. Arguments are made that specific provisions are unnecessarily rigid, too tightly drawn, or exclude equipment arbitrarily. The majority is allowing these tariffs to go into effect without approving them and says that these specific questions on the tariffs will be taken up in the informal proceedings. But a tariff is an application by Bell to do business in a certain way. The majority may not be giving its legal imprimatur to the Bell tariffs, but the fact remains that Bell is now free to do business under these tariffs until it decides to make a change, or the Commission again is forced to institute formal proceedings. I would prefer to have Bell respond formally to each objection to the tariffs posed by private groups, and would hope that the Common Carrier Bureau would make its own evaluation of the public interest factors on a formal record to be presented to the Commission.

We are now confronted with a proceeding in which virtually every party—other than the telephone company and the Common Carrier Bureau—opposes part or all of these tariffs. And yet they are allowed to go into effect, with differences to be resolved in informal closed-door sessions.

I cannot agree that the validity of the telephone company's refusal to permit subscribers to provide their own telephones purchased in a free market is a question which can appropriately be determined through informal discussions. The *Carterfone* case is a testimony to the tenacity of the little fellow who won out over a procedural system which for years permitted the telephone companies to monopolize the connection of private communications systems with the telephone network. While the *Carterfone* decision does much good in permitting beneficial interconnection, the Commission's present treatment of a far more important question will result only in unnecessary delay before it can be resolved. It is tough enough for the little operator to win out in formal proceedings before this Commission and the courts. It is virtually impossible without such protections.

No one will disagree with the importance of the issue presented by the insistence of A.T. & T. and the other telephone companies that they must be the sole provider of all equipment which initiates signaling. But this issue, of such great importance to every telephone company subscriber, is now on the road to being settled through a process in which the ordinary person will have no effective voice and of which, indeed, he is likely to be totally unaware. The telephone companies will be well represented. Large corporations seeking more flexibility in the use of telephone facilities will be well represented. The ordinary person who cannot understand why he should not be permitted to buy his own telephone will not be represented at all, except indirectly by some other party or by the "referee" Commission staff.

I recognize that the entire process of reviewing telephone company tariffs is not conducive to ordinary consumer participation. This makes it all the more important that a question so vitally affecting the ordi-

nary consumer be examined and decided under the light of day in fully public proceedings rather than in informal negotiations. It seems highly unlikely that negotiations can lead to any substantial changes in the telephone company's position on this issue. Therefore, if there is any doubt as to whether the proposed tariff provisions are unreasonable, the question must be explored in a full hearing under section 205 of the communications act, since Commission action to remedy an unreasonable tariff must be after hearing. There is no point in not instituting such a hearing at the outset, and the failure to do so can only result in unnecessary delay. Informal procedures have no advantage over the formal hearing process in this situation. This is not a negotiation among sovereigns where forcing a party to take a public position may make it more difficult for him to back off gracefully. It is a matter for decision by a public body entrusted with the duty to make a decision, and with the power to enforce it. Furthermore, the *Carterfone* proceeding furnishes ample evidence that the hearing process is an excellent means of testing technical claims.

I do not urge that the proposed tariffs must necessarily be rejected or suspended. I do urge that it is a great mistake to enter upon this new exploration to which *Carterfone* was a prelude in a semiprivate bargaining session rather than in the full hearing process in which the public may justifiably have confidence.

APPENDIX G

***Notice Of Inquiry, Proposed Rulemaking and Creation of Federal-State Joint Board (Docket 19528)*, 35 F.C.C.2d 539 (1972)**

F.C.C. 72-522

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSALS FOR NEW OR REVISED CLASSES OF INTERSTATE AND FOREIGN MESSAGE TOLL TELEPHONE SERVICE (MTS) AND WIDE AREA TELEPHONE SERVICE (WATS)	Docket No. 19528

NOTICE OF INQUIRY, PROPOSED RULEMAKING, AND CREATION OF FEDERAL-STATE JOINT BOARD

(Adopted June 14, 1972; Released June 16, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT; COMMISSIONER H. REX LEE ABSENT.

1. Notice is hereby given of (a) an inquiry into whether and under what conditions the telephone companies subject to our jurisdiction should provide new or revised classes of interstate and foreign MTS and WATS service whereby customers would have the option of furnishing "Network Control Signalling Units" (NCSU) and any needed "Connecting Arrangements" (CA) (or the functional equivalent thereof) that are presently furnished only by the telephone company; (b) proceedings to determine what rules, if any, the Commission should adopt with respect to the foregoing; and (c) the convening of a Federal-State Joint Board under Section 410(c) of the Act to submit recommendations to us with respect to the foregoing.

BACKGROUND

2. The interstate (and foreign) MTS and WATS offerings of the telephone companies have historically consisted of the furnishing of facilities, including the telephone hand set, for the public to make interstate or foreign telephone calls between telephones provided by the telephone companies. Thus MTS and WATS services have been and are now offered only as complete services that include the furnishing of the telephone instrument (with certain exceptions applicable, for example, to military installations and remote and hazardous locations). Any changes in the MTS and WATS offerings whereby the telephone company would offer to provide, at the option of the customer, only a portion of such MTS and WATS services and the customer would provide the rest, would constitute a basic and substantial change in the nature of these classifications of services. (See our *Carterfone* and related decisions at 13 FCC 2d 420 (7/27/68); 14 FCC 2d 571 (9/13/68); 15 FCC 2d 605 (12/26/68); 18 FCC 2d 871 (8/13/69); 19 FCC 2d 1068 (10/1/69).)

3. By Memorandum Opinion and Order of December 26, 1968 (15 FCC 2d 605) we initiated informal proceedings with the objective of

exploring the technical feasibility of establishing such new or modified service offerings. This action was taken in response to the contentions made by many users, manufacturers, distributors, suppliers and others that the interstate MTS and WATS service offerings as now constituted, with their restrictions on the provision of customer-owned NCSU's and CA's, are not adequate to meet either the current or prospective needs of the public for more flexible, efficient and economic access to the nationwide switched telephone network. In the informal proceedings initiated by us we were concerned with developing technical, engineering and operational data and information from all available sources to help us ascertain whether such revised service offerings could be made available to the public by the telephone companies without impairing the functioning of the basic nationwide telephone network and whether, and to what extent, measures should be taken to avoid adverse effects upon existing or proposed MTS and WATS services provided to the public generally.

4. To assist us in our evaluation of possible approaches to the resolution of this question we entered into a contract with the National Academy of Sciences (NAS) to make studies for us that were to be directed particularly to the question of whether such revisions in the MTS and WATS service offerings were technically feasible in view of our concern that the network be protected from harm. In its report to us, NAS concluded that, although uncontrolled interconnection of customer-provided facilities to the nationwide telephone network could cause harm to the network, it was technically feasible to accomplish the aforementioned basic revisions in MTS and WATS without network harm by establishing a properly authorized program of standardization and properly enforced certification of customer-provided equipment, installation and maintenance. In addition, pursuant to a contract between the Commission and the consulting firm of Dittberner Associates, we received a report from that firm which also concluded that such service revisions were technically feasible with an appropriate standards and certification program. Dittberner suggested various alternative approaches to accomplishing such revisions including a recommendation for a standards and certification program somewhat less extensive in scope from that suggested by NAS.

5. The reports submitted to us by NAS and Dittberner Associates, and the numerous comments thereon that we received from interested persons, indicated to us that consideration should be given to revisions in MTS and WATS offerings under a standards and enforcement program that would protect the telephone network from three types of harm identified by NAS, namely, (a) protection from excessive voltages and signal levels, (b) improper network signalling and (c) line imbalance. Accordingly, we created two advisory committees, pursuant to Executive Order 11007, to study the possibilities of initiating such a standards program for certain selected classes of equipment, namely, customer-provided PBX's, automatic dialers and recording and answering devices. We believed that, if an acceptable standards program could be developed for these particular devices, we would be in a better position to judge whether such a program for these and other customer-provided facilities was feasible and in the public interest.

These committees are now engaged in this effort. Reports and recommendations from these committees are expected to be submitted to the Commission in the near future.

DISCUSSION

6. Resolution of these matters calls for a determination of whether and with what terms, conditions or limitations interstate tariffs should be revised or the Commission should adopt rules and regulations to permit customers for switched telephone network services to have the option of providing their own network control signalling units and any needed connecting arrangements in lieu of the units and arrangements now provided by the telephone companies. Under ordinary circumstances we could undertake to resolve these questions through the usual procedures provided for under the Act. However, we believe that there are unique conditions applying to this particular matter before us that call for the invocation of extraordinary procedures in which state regulatory agencies will play a significant role in assisting us in our decision-making processes.

7. We believe that special procedures are required for the reason that any action that we might take herein to provide the optional MTS or WATS services as heretofore described would appear to require, as a practical matter, that complementary changes be made in the offerings of local telephone exchange and intrastate toll services. For example, if this Commission should decide that, insofar as interstate or foreign MTS and WATS are concerned, the telephone companies should allow customers the option of providing their own network control signalling units for those otherwise provided by the telephone companies, implementation of such a decision would require, as a practical matter, that the same options are also available in connection with local exchange and intrastate MTS and WATS. This is because almost all such units are used in common for both interstate and local and intrastate communications. Accordingly, we believe that we should not undertake the final resolution of the issues herein without the closest coordination and cooperation between this Commission and state regulatory agencies which have regulatory responsibility for local and intrastate communications services. Therefore, we shall refer these proceedings to a Federal-State Joint Board pursuant to Section 410(c) of the Act.

8. We believe that we should delineate carefully the parameters of the subject matter of our proceeding herein. First, we should make clear that we are not concerned with the question of whether the current tariff prohibitions against customer-provided NCSU's and CA's in the offering of interstate MTS and WATS are in compliance with our decision in *Carterfone* (13 FCC 2d 420, 14 FCC 2d 571). We have already expressly ruled that the tariff requirement that the carrier be the sole supplier of the NCSU in these services does not violate *Carterfone*. We have stated that, in *Carterfone*, we were concerned with the use of customer-owned equipment in connection with MTS services, which, by definition, includes a carrier-provided telephone instrument which performs the network control signalling function. Thus, our decision in *Carterfone* does not hold that a customer may substitute his

own equipment or facilities (whether it be telephone instruments, loops, poles, or central office equipment) for that furnished by the telephone company in providing MTS as that service is defined in the tariff. Our decision in *Carterfone* dealt with "interconnection" and not "replacements of any part of the telephone system." 15 FCC 2d 605, 609–610. The same reasoning applies also to the current tariff prohibition against customer-provided CA's. MTS and WATS offerings historically have included the requirement that all CA's for direct connection of customer-provided equipment (e.g. electrocardiograph, telephotograph and recording devices) to the telephone system must be provided by the telephone company. In our *Recording Devices* decision of 1947 we expressly ruled that only the telephone company could provide CA's to connect customer-provided recording devices to MTS. 11 FCC 1033. Thus, the present restrictions in the interstate MTS and WATS tariffs against customers providing either the NCSU or the CA do not violate our decision in *Carterfone* and the Joint Board will not be concerned with this question. What we are concerned with in this proceeding is whether and under what terms and conditions customers should be given the option of providing their own NCSU's and any needed CA's, or the functional equivalent thereof.

9. As indicated in the foregoing, it is not our intention to consider in this proceeding any question as to whether there should be any modification of our holding in *Carterfone* or any revisions in the tariff provisions applicable to interstate MTS or WATS that have been filed to permit interconnection of customer-provided facilities to MTS and WATS as these services are now constituted. We believe that the soundness of our *Carterfone* decision has been amply demonstrated. New markets have been opened to the innovative enterprise of many companies; the public has benefitted from having a range of choices available when the individual user selects the terminal device or private system which will best serve his particular communications need; and there has been no actual demonstrable harm to the telephone system or its users. Accordingly, this proceeding will not be concerned with any question relating to whether or not modifications should be made in that decision or in any of the provisions in the interstate MTS and WATS tariff provisions filed in compliance therewith. Our proceeding herein is concerned with the pending and unresolved basic issues now before us as to whether, and to what extent, there is public need for us to go beyond what we ordered in *Carterfone* and permit customers to provide, in whole or in part, the aforementioned NCSU's and CA's in interstate MTS and WATS and, if so, what terms and conditions should apply to protect the telephone system and services of others.

10. To facilitate resolution of these issues, as stated in paragraph 5 above, we expect to receive in the near future reports and recommendations from the aforementioned Advisory Committees with respect to technical standards and a program of enforcement thereof designed to permit customers to provide NCSU's and CA's in whole or in part insofar as customer-provided PBX's and automatic dialers and answering devices are concerned. In addition, we have received a number of alternative proposals for achieving the same objectives from other sources. We intend, by supplemental order, to invite public comments

on the Advisory Committee reports and recommendations and the various alternative recommendations. We will refer all such recommendations and comments thereon to the Joint Board for its consideration and recommended decision. We will issue other supplemental orders from time to time, specifying the further procedures to be followed herein and such other specific items of inquiry and rulemaking to be considered in this proceeding under the basic issues set forth above and in accordance with the Section 410(c) procedures provided for herein.

11. We should make clear that we are including proposed rulemaking herein in order to facilitate the implementation of our final decisions in this proceeding. At this stage we are unable to determine whether any action we may wish to take should be implemented by the adoption of rules by the Commission or by the filing of tariff revisions by the carriers, or by a combination of both types of measures. However, we expect to develop in this proceeding all relevant, material and probative data and information needed for us to decide the issues herein including the question of whether and to what extent tariff revisions should be made by the carriers or rules adopted by us. Insofar as tariff revisions may be deemed necessary or desirable, we will be prepared to institute such ancillary procedures and issue such orders as may be required under Section 205 of the Act to prescribe such revisions.

12. ACCORDINGLY, pursuant to Sections 4(i), 4(j), 201–205, 208, 215, 218, 313, 403, 404 and 410 of the Communications Act of 1934, IT IS ORDERED, that the aforementioned inquiry and proposed rulemaking proceeding IS HEREBY INSTITUTED;

13. IT IS FURTHER ORDERED, That a Joint Board is hereby convened pursuant to the provisions of Section 410(c) of the Communications Act of 1934, as amended; that such Joint Board shall consist of the three members of the Commission's Telephone Committee as designated from time to time, and four State Commissioners to be nominated by the National Association of Regulatory Utility Commissioners and approved by this Commission; and that the Chairman of the Commission shall be Chairman of the Joint Board;

14. IT IS FURTHER ORDERED, That the Joint Board shall consider all information, data, comments, views and other submissions in this proceeding and shall prepare a recommended decision to the Commission for its consideration and action; and that the State Commission members of the Joint Board shall sit with the Commission *en banc* at any oral argument that may be scheduled in this proceeding and shall be afforded an opportunity to participate in the Commission's deliberation, but not vote, when the Commission is considering the recommended decision of the Joint Board;

15. IT IS FURTHER ORDERED, That the proceeding herein shall be subject to further order by the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

APPENDIX H

First Supplemental Notice, Docket 19528, 40 F.C.C.2d 315 (1973)

F.C.C. 73-340

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of PROPOSALS FOR NEW OR REVISED CLASSES OF INTERSTATE AND FOREIGN MESSAGE TOLL TELEPHONE SERVICE (MTS) AND WIDE AREA TELEPHONE SERVICE (WATS)	Docket No. 19528

FIRST SUPPLEMENTAL NOTICE

(Adopted March 29, 1973; Released April 3, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. By this first supplemental notice of inquiry and rule-making in this Docket, we are requesting comments on certain proposals submitted recently to the Commission recommending the establishment of programs for technical standards and enforcement thereof that, if adopted, would expand the options available to customers in the interconnection of customer-provided facilities to the nationwide telephone network.

2. In initiating this proceeding we stated that there are two basic issues to be explored. The first, or threshold question, is whether the telephone companies subject to our jurisdiction should be required or permitted to make further significant revisions in their interstate MTS and WATS tariffs so as to give customers options that they do not now have thereunder, namely that of being able generally to provide their own network control signalling units (NCSUs) and any needed connecting arrangements (CAs), or the functional equivalent thereof, in lieu of using telephone company-provided NCSUs and CAs as is now required under the tariffs in all interconnection situations involving direct electrical connections. The second basic issue is to determine what terms and conditions should govern if we should decide to extend such options to customers. We stated that, to facilitate resolution of both of these issues, we had, *inter alia*, established certain Advisory Committees to explore the possibilities of establishing a technical standards program for certain selected classes of equipment, i.e. PBXs, dialers and automatic answering devices, that could be a basis for providing such expanded options, at least as to these devices, and at the same time protect the integrity of the telephone network. (See 35 F.C.C. 2d, 539 et seq.; June 16, 1972)

3. We have now received the reports and recommendations of the PBX Standards Advisory Committee. These documents have been printed in two volumes and are available from the National Technical Information Service, Port Royal Road, Springfield, Virginia 22151.

Volume I (PB 212937) contains the Proposals of the Technical Standards Subcommittee (for Barrier-Type PBX) and Procedures and Enforcement Subcommittee (cost—$6.00). Volume II (PB 212938) contains the attachments to the Report of the Subcommittee on Procedures and Enforcement (cost—$3.00). A third volume (PB 213001) contains a Proposed PBX Experimental Program submitted by the PBX Procedures and Enforcement Subcommittee of the PBX Standards Advisory Committee (cost—$3.00). Any of these three volumes may also be ordered in microfiche form for 95¢ each.

4. In addition to the reports and recommendations of the PBX Standards Advisory Committee, which are limited to customer-provided PBX's, the Office of Chief Engineer of the Commission (OCE) has prepared and submitted a broader proposal that would apply to all kinds of customer-provided devices connected directly to the switched telephone network of the telephone companies. This OCE report is available in printed form as Technical Report T–7202 and may be obtained from the National Technical Information Service, Port Royal, Springfield, Virginia 22121 (cost—$3.00; 95¢, microfiche; PB–213018).

5. The principal features of the OCE proposal are described as follows. The Commission would incorporate into its rules the technical characteristics which must be met by all devices intended for direct connection to the switched telephone network. These specifications would be designed to provide reasonable protection against specific types of harm to the network, namely, hazardous voltages; in-band and out-of-band signal power; line inbalance; and improper network control signaling. Any manufacturer desiring to obtain approval for connection of devices to the switched telephone network would make application to the Commission for registration of each such device, providing a complete description of the device and all data required to demonstrate compliance with the standards. The Commission would, where necessary, also require the submission of sample units to its own laboratory for testing, otherwise, the attestation of the person performing the tests would be acceptable. Upon determination that the equipment would be capable of complying with the standards and that a grant would serve the public interest, convenience and necessity, a registration certificate would be granted. This would be attached to all identical units subsequently produced. If any application presented substantial factual questions that needed to be resolved, it could be set for evidentiary hearing. Registration would constitute authorization for the equipment to be directly connected to the switched telephone network. However, in appropriate cases, registration could be revoked. Applicants for registration would be required to pay filing fees which, as set forth in the proposal, would range from $500 to $1,000 and grant fees which are proposed to range from $100 to $500.

6. Further, under the OCE proposal the burden of showing *actual* (not potential) harm to the switched network in individual cases would rest upon the person claiming that harm was being caused.

This would apply to both the carrier and the customer providing his own device. Where a *proved* harm is found to exist the Commission could issue cease and desist orders. The proposal also provides for the tariffs of the telephone companies to be amended to specify that only devices approved by the Commission could be directly connected to the switched telephone network, and that in the event of *actual* harm, the carrier could disconnect the harmful device, whether or not it was approved. The proposal includes recommended federal legislation similar to that now set forth in Section 302 of the Act under which the FCC would be given express authority to regulate the sale, distribution, import, lease, use and manufacture of interconnection devices and under which the Commission would promulgate regulations to control effectively the marketing of non-complying devices. Finally, the proposal provides for state regulation and enforcement at the local level of any necessary installation or inspection requirements.

7. We have also received an alternative proposal by the NARUC Staff Subcommittee on Communication Interconnection. This proposal was submitted to the Commission under date of March 2, 1973 and is entitled "Procedures and Enforcement For Interconnection of Customer-Provided Communication Terminal Equipment." The Staff Subcommittee states that this proposal contains some concepts differing widely from other submissions and that the areas of most significant differences are: "(a) The proposal for an NARUC–FCC Interconnection Staff Committee as advisory to the Joint Board and/or the FCC on matters relating to an interconnection program; (b) The sections on enforcement methodology; (c) The sections on procedures for equipment installation and periodic maintenance inspection; and (d) The designation of the party to perform installation and periodic maintenance inspections." Copies of this report are available from the NARUC Washington, D.C. office. (1102 Interstate Commerce Commission Building, P.O. Box 684, Washintgon, D.C. 20044—Telephone No. 202–628–7325.)

8. In addition to the foregoing, the Commission has received other alternative suggestions that have been submitted informally in varying degrees of completeness as to specific standards that should apply and as to details of implementation. Some of these alternative proposals may be briefly identified as follows: (1) the suggestion that we adapt to interstate MTS and WATS services the intrastate "access arrangement" proposal of the Rochester Telephone Company approved in substantial part by the New York Public Service Commission in Opinion 72–18, Case 26064, 94 PUR 3d 370 (NY P.S.C. 1972); (2) Suggestions that the carrier be required to establish reasonable standards in the tariffs or in technical references and be responsible for enforcing compliance therewith similar in nature to the recent AT&T tariff revisions applicable to customer-provided headsets; and (3) Suggestions that the tariffs remain basically unchanged but that the carriers be required (a) to make improvements in their services,

such as elimination of delays in delivery of NCSUs and CAs, and (b) apply the same practices to carrier-provided facilities that are applied to customer-provided facilities.

9. These briefly described alternative proposals have not been submitted in sufficiently complete form to enable us or the Joint Board to consider them adequately. Accordingly, we invite interested parties who want to propose these or any other alternative programs to do so at the time fixed herein for filing comments. We emphasize that any alternative proposal should be in at least the same detail as the proposals of the PBX Advisory Committee and the Office of the Chief Engineer. Moreover, by the time that comments herein are due to be filed, we expect that the proposals of the Dialers and Answering Device Advisory Committee will be ready for submission to the Commission. Such proposals should be officially submitted as comments herein. Finally, inasmuch as we are providing that additional proposals may be submitted on or before the comment date, we are expressly allowing for reply comments so that we may have the benefit of the views of all interested parties on any additional proposals that may be submitted.

10. In submitting comments on proposals herein, we wish to make clear that we are concerned at this stage of the proceeding with whether it is feasible from a technical, engineering, operational, and administrative standpoint to establish an optional program of standards and enforcement thereof in lieu of or in addition to the present tariff requirements for carrier-provided NCSUs and CAs. Although we do not wish to limit the scope of comments on any of these proposals, we are not considering at this time questions as to whether or to what extent there may be any adverse economic or environmental consequences from the ultimate adoption of any of these proposals. We shall cover such issues in an appropriate manner by further supplemental notices in the near future. We are, however, interested at this time in ascertaining the total estimated costs of implementing and administering each of the proposed programs and in obtaining comments and views on how such costs should be financed and what persons or groups of persons or entities should be required to bear such costs. Accordingly, we invite the submission of the best estimates of the total costs of administering each proposal that is submitted and views as to how such costs should be borne. Further, we invite comments and views as to the specific procedures and rules that should apply to each proposal submitted, including details as to the methodology that should be followed to assure meaningful and effective enforcement of the requirements set forth in the proposal.

11. Accordingly, pursuant to the provisions of Sections 4(i), 4(j), 201–205, 208, 215, 218, 313, 403 and 404 of the Communications Act, the Commission hereby invites comments from interested parties on the aforementioned proposals of the PBX Standards Advisory Committee, NARUC and Office of Chief Engineer. Such comments, which may include any alternative proposals, shall be submitted on or before June 15, 1973.

Reply comments may be filed on or before August 15, 1973. As provided in our order herein of June 16, 1972 (35 F.C.C. 2d 539; 543) proposals, comments and reply comments will be referred to the Joint Board for its consideration and recommended decision. Based upon its review of the comments and the questions presented thereby, the Commission, after consultation with the Joint Board, will prescribe additional procedures as may be necessary and appropriate for the effective and expeditious resolution of this proceeding. An original and 14 copies of all comments and reply comments shall be submitted.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX I

Pertinent Statutes and Regulations

Section 2 of the Sherman Act, 15 U.S.C. § 2:

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Communications Act of 1934, 15 U.S.C. §§151 *et seq.*

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided,* That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further,* That nothing in this chapter or in any other provision of law shall be construed to prevent a common car-

rier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $1,000 for each offense. Every dis-

tinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

Code of Federal Regulations, 47 C.F.R. § 68.102:

§ 68.102 Registration requirement.

Terminal equipment must be registered in accordance with the rules and regulations in Subpart C of this part, or connected through registered protective circuitry, which is registered in accordance with the rules and regulations in Subpart C of this part.

APPENDIX J

Citations To State Regulatory Decisions

Decisions In Which State Public Utility Commissions Prohibited Telephone Companies From Permitting Customer Ownership Of Telephone Instruments

Bluffs & Winchester Tel. Co., P.U.R. 1915A 928, 929 (Ill. Pub. Utils. Comm'n 1915); *Franksville Tel. Co.*, P.U.R. 1917A 270, 276 (Wis. R.R. Comm'n 1916); *Curtis Tel. Co.*, P.U.R. 1917A 674, 679 (Neb. State Ry. Comm'n 1916); *Springs Mutual Tel. Co.*, P.U.R. 1918A 488, 490 (S.D. Bd. R.R. Comm'rs 1917); *Littlepage v. Mosier Valley Tel. Co.*, P.U.R. 1918E 425, 432 (Or. Pub. Serv. Comm'n 1918); *Swanson*, P.U.R. 1920E 633, 635 (Cal. R.R. Comm'n 1920); *Tognini, Ghezzi & Dalidio Tel. Co.*, P.U.R. 1921C 72, 75 (Cal. R.R. Comm'n 1921); *Badger Mutual Tel. Co.*, P.U.R. 1926A 361, 364 (Wis. R.R. Comm'n 1925); *Pulaski Merchants & Farmers Tel. Co.*, P.U.R. 1925E 674, 676 (Wis. R.R. Comm'n 1925); *Social Tel. Co.*, P.U.R. 1915C 106, 109 (S.D. Pub. Utils. Comm'n 1915); *Guglielmetti Tel. Co.*, 28 Cal. R.C.R. 523 (Cal. R.R. Comm'n 1926). See also *Quick Action Collection Co.* v. *New York Tel. Co.*, P.U.R. 1920D 137, 143–44 (NJ. Bd. Pub. Util. Comm'rs 1920); *Spriggs* v. *Bell Tel. Co. of Pennsylvania*, 3 P.U.R. (n.s.) 42, 44 (Pa. Pub. Serv. Comm'n 1934); *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 70 P.U.R.3d 97, 101 (Minn. D. Ct. 1966); *Proposed Changes in Rates, Charges, Rules and Regulations for Connection of Subscriber-Provided Equipment*, Case No. 25040, p. 166 (N.Y. Pub. Serv. Comm'n, July 8, 1969); *Netsky* v. *Bell Tel. Co. of Pennsylvania*, 65 P.U.R.3d 145, 149 (Pa. Pub. Util. Comm'n 1966); *Harmony of Ft. Lauderdale, Inc.* v. *Southern Bell Tel & Tel. Co.*, 69 P.U.R.3d 261, 266–67 (Fla. Pub. Serv. Comm'n 1967); *Southwestern Bell Tel. Co.* v. *Ralph Hicks*, 57 P.U.R.3d 188, 194 (Ark. Pub. Serv. Comm'n 1965); *Newton* v. *Jamestown Tel. Corp.*, 6 P.U.R. (n.s.) 27, 31 (N.Y. Pub. Serv. Comm'n 1934).